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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

OREGON LABORERS-EMPLOYERS HEALTH & WELFARE FUND, ET AL.,

Petitioners,

v.

PHILIP MORRIS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. This case presents the same question as No. 99-545 (pending on certiorari): Whether health care payors can be deprived of standing to sue under the federal RICO and antitrust statutes for injury to their "business or property" caused by tobacco company defendants, on the ground that such suits are too "remote" and "indirect" as a matter of law, even though:

- the payors directly paid the medical costs in question and are the *only* plaintiffs that can assert RICO and antitrust claims to recover those costs — smokers cannot;

- relegating payors or smokers to piecemeal products liability lawsuits based on state law would completely defeat Congress purpose of providing, in the RICO and antitrust statutes, potent remedies against persistent patterns of enterprise misconduct;

- measuring the payors' aggregate damages statistically would be *easier* and *more reliable* than ascertaining damages in separate personal injury claims by individual smokers; and

- the holding of the court of appeals below conflicts with numerous other decisions in the lowers courts.

2. In addition, this case presents the question whether injunctive relief is available to a private party in a civil RICO action, a matter over which the lower courts are deeply divided.

PARTIES TO THE PROCEEDING

The appellants in the court of appeals (plaintiffs in the district court) were:

Oregon Laborers-Employers Health & Welfare Trust Fund
School District No. 1 Health & Welfare Trust Fund
United Association Union Local No. 290 Plumbers, Steamfitters and Shipfitters Industry Health & Welfare Plan
Office and Professional Employee International Union Local No. 11 Health and Welfare Plan
EBA-PGE-IBEW Local Union No. 125 Health and Welfare Trust
AGC-International Union of Operating Engineers Local 701 Health and Welfare Trust Fund

The appellees below (defendants in the district court) were:

Philip Morris, Inc.
R.J. Reynolds Tobacco Company
Brown & Williamson Tobacco Corporation
British American Tobacco Co., Ltd.
Lorillard Tobacco Company, Inc.
Liggett Group, Inc.
The American Tobacco Company
United States Tobacco Company
The Council for Tobacco Research — USA, Inc.
The Tobacco Institute, Inc.
Smokeless Tobacco Council, Inc.
Hill & Knowlton, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Oregon Laborers-Employers Health & Welfare Trust Fund *et al.* ("Health Trusts") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-22a) is reported at 185 F.3d 957. The order of the district court (App. 23a-47a) is reported at 17 F. Supp.2d 1170.

JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, 1337, 1367; 15 U.S.C. §§ 15, 26; and 18 U.S.C. § 1964. The court of appeals had subject matter jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit issued its opinion on July 14, 1999.

STATUTORY PROVISIONS INVOLVED

The relevant portions of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") and the antitrust laws are reproduced at App. 48a-50a.

STATEMENT

This case presents a question of enormous legal and public significance which is also presented by No. 99-545 (pending on certiorari): whether, in a case in which the facts show a persistent and deliberate pattern of violations of the RICO and antitrust statutes, courts may deny standing under those statutes to plaintiffs that have borne the resulting economic costs. This question is related to that in *Beck v. Prupis*, No. 98-1480, which involves the proper interpretation of the proximate cause factors of *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), in a case brought by a terminated employee under RICO.

In addition, this case presents the question whether injunctive relief is available to a private party in a civil RICO action, a matter over which the lower courts are deeply divided.

The plaintiffs in this case are six employee health trust funds located in Oregon that pay for medical benefits to workers, retirees, and their families. The defendants are tobacco companies and related industry members. The tobacco defendants are alleged to have engaged in a decades-long fraudulent scheme to preserve their markets and avoid the costs of treating smoking-related diseases by counteracting smokers' efforts to quit; impairing health providers' ability to reduce costs through effective smoking cessation programs and safer cigarettes; and concealing the industry's active role in manipulating and perpetuating the resulting health care crisis.

Defendants' misconduct constitutes the core type of wrongdoing for which Congress determined, in enacting the RICO and antitrust laws, that the preexisting state and common law remedies were inadequate. Congress therefore supplemented governmental enforcement efforts with the litigation resources of affected businesses.

The Ninth Circuit did not doubt the sufficiency of plaintiffs' RICO and antitrust allegations. But the court held that the Health Trusts lacked standing to sue as a matter of law under RICO or antitrust to recover their damages, on the ground that the causal link between defendants' misconduct and the injury to the Trusts' business and property was "too remote" and "indirect" under common law principles of proximate cause

and that the damages were too "speculative" — all because tobacco inflicts bodily injury on smokers in the course of causing economic harm to the Health Trusts. App. 9a-14a.

The results of the court's holding are profound. First, it disqualifies on standing grounds the *only* plaintiffs that paid the medical costs at issue and suffered the economic loss to their business or property — i.e., the *only plaintiffs otherwise legally able to assert these RICO and antitrust claims*. Second, the holding below thereby relegates claimants against the tobacco industry to the state and common law remedies that Congress found to be historically *inadequate* when enacting the RICO and antitrust laws. Finally, the Ninth Circuit's denial of standing to the Health Trusts because the defendants have effectuated their scheme and ensured their profits by first causing bodily injury to persons connected to their business (their customers) ignores the fact that bodily injury often has been one of the ways that RICO enterprises and antitrust violators have traditionally carried out their wrongdoing, and it is accordingly perverse to exclude that misconduct from the ambit of the statutes on standing grounds.

Although this case arises in the context of tobacco, the decision below implicates broader and deeper issues of standing under federal statutes. This Court has *never* countenanced dismissal of a RICO or antitrust claim as too indirect without identifying a more directly injured party with the ability and incentive to sue to remedy the *same* statutory violation. Nor has this Court allowed narrow readings of the RICO and antitrust laws to undermine the broad remedial purposes of the statutes. But the Ninth Circuit asserted that "[s]ome injuries" under these statutes may "be left unremedied for lack of a proper plaintiff." App. 10a. If the decision below is permitted to stand, then these federal laws are subject to standing requirements that contradict their very statutory purposes.

Therefore, this is not just a tobacco case. The Ninth Circuit's judgment conflicts with numerous decisions outside the tobacco context and has sweeping implications beyond tobacco. In a complex economy, injuries to business and property are often mediated through effects on third parties. If a claim involving a straightforward and well documented causal chain can be disqualified simply because the chain can be de-

scribed as indirect, then the RICO and antitrust statutes will be eviscerated. The Ninth Circuit created a new requirement for "direct" injury that conflicts with this Court's decisions in *Sedima v. Imrex Co.*, 473 U.S. 479 (1985); *Holmes v. SIPC*, 503 U.S. 258 (1992); *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994); *Associated General Contractors v. California State Council*, 459 U.S. 519 (1983) (*AGC*); and *Blue Shield v. McCready*, 457 U.S. 465 (1982).

There is a clear and deep division among the lower courts warranting certiorari. The Ninth Circuit's decision depriving health care payors of standing conflicts with such decisions as *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), which grant RICO and antitrust standing only to the health care payor, not to the individuals suffering bodily injury.

In addition, the Ninth Circuit's judgment conflicts with decisions in state tobacco litigation. Beginning in 1994, more than 40 state attorneys general sued the tobacco industry for health care costs borne by state treasuries. Many of these suits sought recovery for *state employee* health and welfare funds — the same type of recovery plaintiff Health Trusts seek here. In the state litigations court after court rejected the same remoteness argument adopted by the Ninth Circuit in this case. Only one state suit (in Indiana) was dismissed in its entirety, in a two-page order supplying no analysis or reasoning. The tobacco industry chose to settle the state suits for over $200 billion.

The Ninth Circuit's decision also merits review in light of the lawsuit filed by the United States on September 22, 1999 against the tobacco industry in the United States District Court for the District of Columbia, seeking recovery of smoking-related health care costs for Medicare recipients, veterans, military personnel, and federal employees. That lawsuit relies on the same allegations of industry misconduct as asserted by the Health Trusts in this case, and also includes RICO as one of its principal claims.

1. ***The history of defendants' fraudulent conspiracy.*** As the United States has explained in its recently filed lawsuit, the tobacco companies "have repeatedly and consistently denied that smoking cigarettes causes disease, even though they have

known since 1953, at the latest, that smoking increases the risk of disease and death. [They] have repeatedly and consistently denied that cigarettes are addictive even though they have long understood and intentionally exploited the addictive properties of nicotine. [They] have repeatedly and consistently stated that they do not market cigarettes to children while using advertising and marketing techniques to make their products attractive to children. Even though they have long understood the hazards caused by smoking and could have developed and marketed less hazardous cigarette products, [they] chose and conspired not to do so." Complaint in *United States v. Philip Morris, Inc.*, & 4 (D.D.C. Sept. 22, 1999).

For example, despite the industry's claim that it does not target youth smokers, internal industry documents refer to children as "new replacement smokers" and contain such statements as:

" . . [T]he base of our business is the high school student."

" . . [W]e must get our share of the youth market."

"It is important to know as much as possible about teenage smoking . . . . [S]moking patterns of teenagers are particularly important to Philip Morris."

The industry also has denied that nicotine is addictive and that the companies manipulate nicotine levels. On April 14, 1994, the chief executives of all seven major cigarette manufacturers made such statements under oath before the House Subcommittee on Health and the Environment. William Campbell, then CEO of Philip Morris USA, testified that "I believe nicotine is not addictive." RJR CEO James W. Johnston testified that "smoking is no more addictive than coffee, tea or Twinkies."

Yet internal tobacco company documents show that such statements are false. A 1972 Philip Morris report stated: "The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarette as a dispenser for a dose unit of nicotine." A 1972 RJR memo concluded: "In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized, segment of the pharmaceutical industry." A Brown & Williamson scientist wrote in 1963: "I think that we can say even now that we can regulate,

fairly precisely, the nicotine and sugar levels to almost any desired level management might require."

The industry also has suppressed the development of safer cigarettes. For example, Dr. James Mold of Liggett & Myers has stated that scientists "produced a cigarette which was, we felt, commercially acceptable as established by some consumer tests, which eliminated carcinogenic activity." However, all meetings on the project were attended by lawyers, and "[w]henever any problem came up on the project, the Legal Department would pounce upon that in an attempt to kill the project, and this happened time and time again." Liggett never marketed the safer cigarette, and its president "was told by someone in the Philip Morris Company that if we tried to market such a product that they would clobber us."

In addition, the industry has lied to the courts and abused the judicial process. The companies have fraudulently asserted privileges for various incriminating documents by cycling them through their legal departments and outside law firms.[1]

Dr. Jack E. Henningfield, who for 16 years served as an official of the National Institute on Drug Abuse (part of the National Institutes of Health) has described the industry's public posture as "lying and deceit and fraud." The Journal of the American Medical Association has editorialized that "the evidence is unequivocal — the U.S. public has been duped by the tobacco industry. No right-thinking individual can ignore the evidence." *The Brown & Williamson Documents: Where Do We Go From Here?*, 274 Jama 256, 258 (July 19, 1995).

Not surprisingly, the Florida trial court hearing the state's claim against the tobacco industry opined that the allegations

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[1] *See American Tobacco Co. v. Florida*, 697 So. 2d 1249, 1257 (4th Dist. Fla. App. 1997) ("There was also evidence that the defendants utilized their attorneys in carrying out their misrepresentations and concealment to keep secret research and other conduct related to the true health dangers of smoking."); *Minnesota v. Philip Morris, Inc.*, No. C1-94-8565, slip. op. (Minn. Dist. Ct. May 8, 1997) ("Plaintiffs . . . have made a *prima facie* case to invoke the crime fraud exception"), and slip op. (Dec. 16, 1997) ("review of the documents reveals a conspiracy of silence and suppression of scientific research").

"would seem to make out a case for 'the mother of all RICO actions.'" *Florida v. American Tobacco Co.*, No. CL95-1466, slip op. (Fla. Cir. Ct. Dec. 13, 1996).

2. ***Defendants' efforts to target third-party health payors.*** A primary aim of defendants' conspiracy was to externalize health care costs so that they would be paid by third-party payors such as Health Trusts. For example, internal tobacco company memoranda obtained by the State of Texas in its lawsuit admitted that "costs associated with smoking and health are not social costs but transfer payments." Specific among the costs identified by the tobacco companies were "hospital costs, other medical treatment, G.P. consultations, pharmaceutical, preventive medicine, rehabilitation, capital investment in medical facilities and research." Philip Morris acknowledged that "as health care costs rise astronomically, the opposition becomes armed with more potent weapons."

3. ***Nature of the plaintiff health trusts.*** This suit was brought by six Oregon-based health funds representing thousands of union and public-sector workers and retirees and their families. Joint labor-management, multi-employer health and welfare trust funds are established pursuant to 29 U.S.C. § 186(c)(5) as legally distinct entities from the unions sponsoring them and the employers whose workers are covered by them. Nationwide, such non-profit health trusts provide benefits to some 33 million American workers, dependents, and retirees and play a vital role in our national health care system, especially in unionized industries like construction, in which workers move from employer to employer, making single-employer health benefit plans impracticable. Each trust is governed by a board of trustees who administer the trusts for the sole benefit of the covered workers and dependents. With the help of professional consultants and administrators, the trustees decide what benefit programs will be maintained by the trusts (types of health benefits, benefit levels, eligibility, and so on). Any increases in tobacco-related medical costs act to deplete the funds available to pay for other treatment or preventive care, for smokers and non-smokers alike.

4. ***Procedural history.*** The complaint asserted claims under the federal RICO and antitrust laws, as well as under the Oregon RICO statute, the Oregon Unfair Trade Practices Act

("UTPA"), Oregon common-law doctrines of fraudulent misrepresentation and concealment, unjust enrichment, negligent breach of a specially assumed duty, and civil conspiracy. Plaintiffs sought damages as well as equitable relief.

The district court dismissed the complaint under Rule 12(b)(6), holding that smokers were the parties most directly injured, that the Health Trusts' injuries were "one step removed," and that smokers could recover "the full spectrum of damages" sought by the Health Trusts. App. 32a. The district court dismissed the state-law claims as well, opining that plaintiffs did not meet the standing requirements of the UTPA because they were not "consumers" of defendants' products, even though the statute grants standing to "any person." App. 38a.

The Ninth Circuit affirmed on remoteness grounds. The court acknowledged that "individuals that suffer personal injury cannot claim medical expenses as 'injury to business or property' and that the smokers are therefore barred from asserting RICO and antitrust claims." App. 9a-10a. "[S]mokers cannot vindicate the public interest in antitrust [or RICO] enforcement." App. 10a (internal quotation omitted; brackets in original). However, "[s]ome injuries caused by an antitrust violation may thus be left unremedied for lack of a proper plaintiff." App. 10a. "Although the smokers cannot recover under either RICO or the antitrust laws, they can seek recovery under other state law theories for personal injury and the associated medical costs — the same damages that plaintiffs seek to recover." App. 10a.

The Ninth Circuit also held that the Health Trusts' damages claims were "highly speculative" because they relied on a showing of "how many smokers would have stopped smoking if provided with smoking-cessation information, how many would have begun smoking with less dangerous products, how much healthier these smokers would have been if they had taken these actions, and the savings the Funds would have realized by paying out fewer claims for smoking-related illnesses." App. 11a.

The Ninth Circuit recognized that the Health Trusts sought equitable relief under RICO and the antitrust laws and that standing analysis for equitable claims was not the same as that

for damages. Nonetheless, the court dismissed the plaintiffs' equity claims under RICO on the sole ground that "'injunctive relief is not available to a private party in a civil RICO action.'" App. 19a (quoting *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1077 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987)). The court went so far as to rule that the Health Trusts could not even seek relief under the Oregon UTPA, which expressly grants standing to "any person who suffers any ascertainable loss of money" resulting from a violation of the law. App. 19a. The Ninth Circuit nonetheless held — without certifying the question to the state courts — that "the UTPA, like the other [federal] statutes we have discussed, is not intended to provide a cause of action to a nonconsumer that is wholly derivative of injury to consumers." *Id.*

REASONS FOR GRANTING THE WRIT

The Ninth Circuit substituted a new test of proximate cause for the standard established by Congress. The RICO and antitrust standing inquiry uses three factors to identify the best plaintiff to bring suit and then concentrates the statutory cause of action in that person. In this case, the Ninth Circuit held that the only possible plaintiffs to assert the RICO and antitrust claims for the medical costs in question — the Health Trusts which have suffered the injury to business and property interests protected by the RICO and antitrust laws — are unable to sue. The court of appeals' judgment conflicts with the decisions of this Court in *Sedima, Scheidler, Holmes, AGC*, and, and with numerous decisions in the lower courts. *McCready* Noted antitrust commentators have strongly criticized the Ninth Circuit's approach. Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law at 95 & n.8 (1999 supp.).

The Ninth Circuit's opinion also conflicts with a recent decision of the Third Circuit dismissing similar claims by different health trusts in *Steamfitters Local Union No. 420 v. Philip Morris, Inc.*, No. 99-545 (pending on certiorari). The Third Circuit, although ruling for the tobacco defendants, determined that there were no more-directly-injured parties who could sue and that duplicative damages and apportionment were not serious problems. App. in No. 99-545 at 25a-26a & nn. 9-10. The

Third Circuit concluded that there is "little danger of duplicative litigation or complex apportionment of damages among various groups of plaintiffs." *Id.* at 25a-26a. The Ninth Circuit took a contrary view, asserting that smokers filing personal injury product liability suits would present a danger of duplicative recovery and complex apportionment of damages. App. 14a. The disagreements between the Third and Ninth Circuits reinforce the need for certiorari. This case is also related to *Beck v. Prupis*, No. 98-1480, which involves the proper application of the *Holmes* factors in a case brought by a terminated employee under RICO.

In addition, this case presents a question not presented in No. 99-545: whether injunctive relief is available to a private plaintiff in a civil RICO case. This fundamental question has divided the lower courts for more than a decade, and this Court's review is urgently needed.

I. This Court Should Grant Review on the RICO and Antitrust Standing Question.

The RICO and antitrust statutes were intended to overcome limitations in state law by affording a potent new remedy to those whose business and property is injured by wrongdoing. "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima v. Imrex Co.*, 473 U.S. 479, 498 (1985). "Congress' concern [in enacting RICO] was not for the direct victims of the racketeer's acts, whom state and federal laws already protected, but for the competitors and investors whose businesses and interests are harmed or destroyed by racketeers." *Id.* at 519 (Marshall, J., dissenting). Congress explicitly found that existing "sanctions and remedies" were "unnecessarily limited in scope and impact" and that "enhanced sanctions and new remedies" were needed. Pub. L. No. 91-452, § 1, 84 Stat. 922, 923 (1970). RICO states that its provisions "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947. Indeed, one of Congress' objectives was to address defects and limitations in state law and state court proceedings. *See* RICO's "Statement of Findings and Purpose," Pub. L. 91-452, 84 Stat. 922 (1970). "Congress enacted RICO

in order to supplement . . . the available remedies [under federal and state law] since it thought those remedies offered too little protection for the victims." *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 392 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

Yet under the Ninth Circuit's ruling, the entire health care industry — one of the largest and fastest-growing segments of the United States economy — is disabled from suing the tobacco industry under the RICO and antitrust statutes for inflicting billions of dollars in medical costs through schemes to defraud and conspiracies to suppress product safety competition. These injuries to business and property "have allegedly undermined the financial health and stability of a critical industry in this nation — that devoted to health care of millions of people." *National Asbestos Workers Medical Fund v. Philip Morris*, No. 98 CV 1492, mem. op. at 31 (E.D.N.Y. Sept. 7, 1999). "This is arguably precisely the type of economic injury which RICO was designed to address and deter." *Id.* at 32.

The Ninth Circuit effectively bestowed a civil immunity on tobacco companies that Congress repeatedly has refused to legislate. By itself, the significance of tobacco litigation would warrant certiorari. There is a clear national interest in holding tobacco companies accountable for the public health devastation they have wreaked. More than 40 states have sued the tobacco industry since 1994. On Sept. 22, 1999, the United States brought its own lawsuit under RICO and other statutes to recover tobacco-related federal health care costs. This Court currently is considering the industry's challenge to anti-smoking regulations adopted by the Food and Drug Administration, which the Solicitor General has described as being "of overriding public importance" and as presenting "an unparalleled opportunity to prevent millions of children from beginning a highly addictive habit that often leads to premature death."[2] When this Court granted the FDA's petition for certiorari, the President stated that "I am very pleased that the Supreme Court has agreed to take up the case regarding the Food and Drug

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[2] Petition for Certiorari in *FDA v. Brown & Williamson Tobacco Corp.*, No. 98-1152.

Administration's regulation of tobacco products. . . . Every day, 3,000 young people become regular smokers and 1,000 will have their lives cut short as a result." The immunity granted to the tobacco companies by the Ninth Circuit flies in the face of the national interest in holding them responsible for their misconduct.

Moreover, the decision below carries enormous implications beyond the tobacco context. A black-letter rule barring all claims by parties who pay the medical expenses of others would be absurd. For example, fraudulent overbilling or anti-competitive price-fixing by a cancer medicine supplier would not be actionable by the payor because it would not create any costs unless some third party cancer patient needed the medicine. Going beyond the health field, many injuries to business and property that Congress sought to remedy in the RICO and the antitrust laws involve multiple causation steps. If that alone were enough to render the statutes inapplicable, Congress' handiwork would be significantly nullified. Thus, noted antitrust authorities have emphatically disagreed with the standing analysis adopted by the Ninth Circuit. Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW at 95 & n.8 (1999 supp.).

A. The Decision Below Conflicts With Decisions of This Court.

For cases involving a causal chain that includes several potential plaintiffs harmed at different levels by a defendant's misconduct, this Court has formulated three policy factors to determine whether a given plaintiffs' injury is sufficiently proximate or direct to sustain an action for damages under the RICO and antitrust statutes:

(1) Whether more "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."

(2) Whether "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury

from the violative acts, to obviate the risks of multiple recoveries."

(3) Whether indirectness makes it "more difficult to . . . ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors." *Holmes*, 503 U.S. at 269. *See also AGC*, 459 U.S. at 540-45.

The purpose of these factors is to identify which of several possible plaintiffs will be given standing to sue for a RICO or antitrust violation. The aim, in other words, is to produce the *best* plaintiff. The decision below produced *no* plaintiff. This Court has *never* dismissed a claim as too indirect without identifying a more directly injured party who could sue to remedy the same violation. By contrast, the Ninth Circuit asserted that "[s]ome injuries caused by an antitrust violation may thus be left unremedied for lack of a proper plaintiff." App. 10a.

In this case, the Health Trusts are the only potential plaintiffs that have suffered the economic losses at issue, and the only possible plaintiffs legally able to sue. Further, the Trusts, as special and favored creatures of federal law, are the most natural plaintiffs. Congress has bestowed on them the authority to sue in their own names, 29 U.S.C. § 1132(d)(1), and charged them with "ensur[ing] that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries." *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 571 (1985). Congress has specifically provided that the trusts are not be regulated as insurers, *see* 29 U.S.C. § 1144(b)(2)(B), thus casting grave doubt on any suggestion that the trusts should sue in subrogation on behalf of their participants — wholly apart from the fact that proceeding smoker-by-smoker in subrogation would be so expensive as to be utterly impractical.

As health care payors for some 33 million American workers, dependents, and retirees, many of whom would otherwise lack coverage, health trusts play a major role in the health care delivery system in this country and accordingly are appropriate parties to enforce RICO and the antitrust laws. Indeed, the trusts represent the groups most at risk from smoking. Nine million people served by trusts are addicted smokers. Over 45 percent of workers are current smokers; over 40 percent of blue collar workers' children become hard-core smokers; and at

least 25 percent of blue collar smokers continue to use cigarettes during pregnancy. The trusts spend over 10 percent of their budgets on treating smoking-related illnesses.

Thus, this is a not a case of selecting among several possible RICO or antitrust plaintiffs. There is only one group of candidates, and its members are perfectly suited to asserting the claims. In ruling otherwise, the court of appeals did not merely misapply the *Holmes/AGC* factors; rather, it created what amounts to a new legal test for proximate cause under the RICO and antitrust statutes, one which turns the concept of "standing" on its head.

1. ***Directness Is a Policy Conclusion, Not a Separate Factor.*** The Ninth Circuit improperly treated the supposedly "indirect" nature of the Health Trusts' injuries as a separate factor. The court held that "all of plaintiffs' claims rely on alleged injury to smokers," and "there is no 'direct' link between the alleged misconduct of defendants and the alleged damage to plaintiffs." App. 8a.

This Court has rejected that approach. Calling a particular causal chain "indirect" or "remote" is merely a conclusion that follows from applying the relevant policy factors. The proximate cause inquiry is not determined by any formal rule of indirectness. *See AGC*, 459 U.S. at 536 n.33 (specifically rejecting the black-letter "directness of the injury" or "target area" tests, stating that instead "courts should analyze each situation in light of the factors set forth in the text"); *see also Holmes*, 503 U.S. at 272 n.20.

This Court has held repeatedly that a plaintiff may sue even when his injury is derived from the effects of the defendant's misconduct on intervening third parties. In *AGC*, this Court opined that unionized subcontractors, who were the secondary victims of coercion by the defendants, would have antitrust standing even though their injury was indirect. *See AGC*, 459 U.S. at 541-42. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), this Court held that a Blue Cross plan participant had antitrust standing to bring suit against an alleged unlawful conspiracy between Blue Cross and participating psychiatrists, which was aimed not at the plaintiff but at psychologists. In *Holmes*, the Court recognized that its holding did not necessarily bar indirect claims (1) by brokerage clients

suing for manipulation of stock they purchased from the brokerage firm, *see Holmes*, 503 U.S. at 272 n.19, and (2) by non-purchasing brokerage clients suing for stock parking that had the effect of evading the firm's capital requirements. *Id.* And in *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994), this Court indicated that a business has standing to sue for injuries to its property by virtue of racketeering-inflicted personal injuries to its workers.[3]

The Ninth Circuit's judgment also conflicts with other federal decisions outside the tobacco context holding that indirectly injured plaintiffs have RICO or antitrust standing under *AGC* and *Holmes* even though they were not the party directly deceived by the defendants' misconduct. In *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1414 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), for example, Chief Judge Posner, writing for the court, held that a health care payor alleging overcharges due to a division of markets by providers had standing to sue for the overcharges, even though they were incurred because of patients' bodily injuries (and would not have been incurred absent those injuries). Moreover, the court opined that the patients would not be given standing because vigorous private antitrust enforcement could be ensured only by concentrating the claim in a single large suit

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[3] *Allied Tube v. Indian Head*, 486 U.S. 492, 495-96 (1988), held that a manufacturer of plastic conduit could sue a manufacturer of steel conduit who improperly influenced a trade association, which in turn promulgated a safety code that contained false product safety information about plastic conduit, which in turn influenced market participants either not to use plastic conduit or (even more indirectly) to disapprove its use by others. In *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977), this Court recognized that indirect purchasers could bring suit when a direct buyer passed on the full price increase through a cost-plus contract. *Id.* at 736. *See American Soc'y v. Hydrolevel*, 456 U.S. 556, 560-64 (1982) (plaintiffs allowed to sue when defendant deceptively caused standard-setting nonprofit to issue misleading interpretative letter that in turn misled customers into not using plaintiffs' products); *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (plaintiffs allowed to sue for securities fraud that deceived stock market professionals, who in turn affected the market price, which in turn harmed plaintiffs).

by the Blue Cross payor. *See also Steele v. Hospital Corp. of America*, 36 F.3d 69, 70 (9th Cir. 1994).

In *Mid Atlantic Telecom. Corp. v. Long Distance Servs.*, 18 F.3d 260 (4th Cir. 1994), the Fourth Circuit held that a plaintiff telecommunications carrier had RICO standing to sue a competing telephone company that deceived customers with artificially low rates and thus enticed them away from plaintiff. The court rejected "a rule that only injuries suffered by the immediate victim of a predicate act satisfied the 'by reason of' requirement of § 1964(c)" in favor of a "proximate cause analysis" that "should focus on the temporal and circumstantial relationship between the defendant's conduct and the injury suffered by the plaintiff, and the foreseeability that intervening events would cause injury to the plaintiff." *Id.* at 263.[4]

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[4] *See also Khurana v. Innovative Health Care*, 130 F.3d 143, 151-52 (5th Cir. 1997) ("RICO civil standing is not limited to only the immediate victim of a defendant's RICO violation." It is enough that indirect injury was "foreseeable by the defendants and could certainly be anticipated as a natural consequence of their alleged misrepresentations"), *vacated as moot*, 119 S. Ct. 442 (1998);

Israel Travel v. Israel Identity Tours, 61 F.3d 1250, 1257 (7th Cir. 1995) (*Holmes* did not preclude RICO standing for plaintiff who alleged defendant deceived its customers into not doing business with plaintiff, because in *Holmes*, "the Supreme Court observed that it did not mean to preclude all possibility of recovery for injury that was transmitted indirectly");

Raybestos Products Co. v. Younger, 54 F.3d 1234, 1241-43 (7th Cir. 1995) (business has RICO standing to sue for intimidation directed at its customers);

GICC Capital Corp. v. Technology Finance Group, 30 F.3d 289, 292-93 (2d Cir. 1994) (creditor has RICO standing to sue defendant who defrauded corporation when indirect harm is "reasonably foreseeable or anticipated as a natural consequence");

In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1168-69 (3d Cir. 1993) (steel companies had antitrust standing to sue defendant railroad for suppressing self-loaders that intermediary vessel companies in turn could have used to transported ore to plaintiffs at lower cost than other transportation options);

Ceribelli v. Elghanayan, 990 F.2d 62, 65 n.3 (2d Cir. 1993) (shareholder in cooperative has RICO standing to sue for fraud on coop-

erative because test under *Holmes* is whether indirect injury is "foreseeable");

Beiter v. Blomquist, 987 F.2d 1319, 1325 (8th Cir. 1993) (plaintiff has RICO standing to sue defendant for bribing government official, which resulted in denial of plaintiff's zoning application);

Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., 985 F.2d 102, 103 (2d Cir. 1989) (defendant who defrauded racetrack owner could be sued by those who in turn depended on racetrack for their livelihood, including "horse owners, trainers, drivers, grooms, blacksmiths, veterinarians, racing officials and pari-mutual clerks": "The test of proximate cause [under RICO] is whether the defendant's acts 'are a substantial factor in the sequence of responsible causation' and whether 'the injury is reasonably foreseeable or anticipated as a natural consequence.'");

R.R. Brittingham v. Mobil Corp., 943 F.2d 297, 304 (3d Cir. 1991) (RICO proximate cause is established when defendant's misconduct was a Asubstantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence");

In re EDC, 930 F.2d 1275, 1279 (7th Cir. 1991) (purchaser of corporation has RICO standing to sue for fraud on corporation);

Taffet v. Southern Co., 930 F.2d 847, 856-57 (11th Cir. 1991), vacated, 958 F.2d 1514 (11th Cir. 1992) (utility customers have standing to sue utilities who defrauded rate regulators who in turn increased utility rates) (cited favorably in *Holmes*, 503 U.S. at 272 n.19);

County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311-12 (2d Cir. 1990) (RICO) (same) (cited favorably in *Holmes*, 503 U.S. at 272 n.19);

Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1101 (2d Cir. 1988) (defendant who defrauded corporation could be sued in RICO by corporate creditor) (cited favorably in *Holmes*, 503 U.S. at 272 n.19);

National Ass'n of Pharmaceutical Mfrs. v. Ayerst Lab., 850 F.2d 904, 912-13 (2d Cir. 1988) (plaintiff had antitrust standing to sue defendant for disseminating deceptive product information to pharmacists that in turn caused those pharmacists to cease prescribing plaintiff's product);

Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1066-67 (3d Cir. 1988) (plaintiff had antitrust and RICO standing to sue defendant who bribed a buyer, which in turn caused plaintiff to lose bid), *aff'd*, 493 U.S. 400 (1990);

International Travel Arrangers v. Western Airlines, 623 F.2d 1255, 1268 (8th Cir. 1980) (travel agents had antitrust standing to sue defen-

Even if formalistic indirectness were a relevant factor, it could not possibly justify dismissing the claim (under the one-link causal chain) that plaintiff health funds were directly lied to, defrauded, and deprived of the benefits of new and safer tobacco products. The effect of defendants' misconduct on the Health Trusts was not mediated through any effect on a third party.

2. ***No More-Directly-Injured Party Could Sue.*** The court acknowledged that "individuals that suffer personal injury cannot claim medical expenses as 'injury to business or property'" and that "smokers cannot vindicate the public interest in antitrust [or RICO] enforcement." App. 9a-10a (internal quotation omitted; brackets in original). However, the court insisted that "[s]ome injuries caused by an antitrust violation may thus be left unremedied for lack of a proper plaintiff." App. 10a.

In fact, *no decision of this Court has ever dismissed a claim as too indirect without identifying a more directly injured party who could sue to remedy the same RICO or antitrust violation.* This Court has always stressed the need "that at least some party have sufficient incentive to bring suit." *California v. ARC America Corp.*, 490 U.S. 93, 102 n. 6 (1989). *Accord Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 214 (1990) ("our interpretation . . . must promote the vigorous enforcement of the antitrust laws"); *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 151 (1987) ("private attorneys general [for] a serious national problem for which public prosecutorial resources are deemed inadequate"); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241 (1987) ("vigorous incentives for plaintiffs to pursue RICO claims"); *Sedima v. Imrex Co., Inc.*, 473 U.S. 479, 493 (1985) ("private attorney general provision . . . designed to fill prose-

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dant for misleading advertisement directed at general public that in turn caused public not to use travel agents);

Prudential Ins. v. United States Gypsum, 828 F. Supp. 287, 289-92 (D.N.J. 1993) (asbestos makers who deceived those who bought their products and suppressed safer products could be sued by plaintiffs who did not buy asbestos but subsequently bought buildings containing asbestos).

cutive gaps" (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (antitrust)).

Accordingly, before denying standing to an indirect party under antitrust or RICO, this Court has inquired whether "the general interest in deterring injurious conduct" otherwise will be served by some more "directly injured victims [who] can generally be counted on to vindicate the law as private attorneys general." *Holmes*, 503 U.S. at 269. Moreover, this Court has opined that it will not deny standing when that is "likely to leave a significant antitrust violation undetected or unremedied." *AGC*, 459 U.S. at 542. The Ninth Circuit's decision flies in the face of this principle.

3. ***No Duplicative Damages or Apportionment Problem Exists.*** In contrast to the Third Circuit, the Ninth Circuit claimed that duplicative damages and apportionment would pose an obstacle to the Health Trusts' suit: "Although the smokers cannot recover under either RICO or the antitrust laws, they can seek recovery under other state law theories for personal injury and the associated medical costs — the same damages that plaintiffs seek to recover." App. 14a. In fact, because the Health Trusts' complaint does not seek recovery of any medical costs or higher prices paid by smokers themselves, their damages automatically would be excluded by any computation of the medical costs that the Health Trusts paid and accordingly would pose no duplicative damages problem necessitating complex apportionment.

More fundamentally, however, as a matter of law RICO and antitrust claims do not "duplicate" individual smoker product liability claims. State tort law is focused on different wrongs with different elements. RICO expressly allows overlap between RICO and state law remedies. See 84 Stat. 947 (1970) (§ 904(b), P.L. 91-452) ("Nothing in...[RICO] shall supersede any provision of Federal, State, or other law imposing criminal penalty or affording civil remedies in addition to those provided...[by RICO]."); *see also ARC America*, 490 U.S. at 105 (Sherman Act does not preempt even state antitrust law, let alone state products liability law). Thus, in *Illinois Brick, McCready, AGC*, and *Holmes*, this Court has considered damages "duplicative" only if one plaintiff's RICO (or antitrust)

claim overlapped the same RICO (or antitrust) claim brought by another plaintiff.

4. Indirectness Does Not Make It "More Difficult" to Ascertain Damages. The Ninth Circuit held that the Health Trusts' damages claims were too "speculative" because they involved allegations about what the funds and smokers would have done in the absence of fraud. App. 11a-13a. In so holding, the court of appeals fundamentally misconceived the proper inquiry established by this Court.

The test is not whether a damages claim is difficult or hard to prove in the abstract. Rather, the test is whether indirectness makes it "*more* difficult" to ascertain damages than if a more directly injured party sued. *Holmes*, 503 U.S. at 269 (emphasis added). The concern about relative difficulty of proof presupposes that a more direct party with more ascertainable damages could bring the same claim. If one does exist, statutory enforcement would be enhanced by giving that party standing because it will avoid the additional "problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 269. Once again, the point is to *aid* statutory enforcement by giving the claim to the plaintiff who will face the fewest problems with causal proof, not to block enforcement.

But the Health Trusts are the only possible plaintiffs for the claims in question. There is no other, more directly injured party who could sue. Thus, the relative judgment commanded by this Court — *which* plaintiff has the more easily ascertainable damages?— cannot be used to disqualify the Health Trusts' suit.

The court of appeals fallaciously stressed the causal complications of determining whether, absent the defendants' misconduct, smokers would have stopped smoking or smoked safer cigarettes, and how much in medical costs would have been saved as a result. App. 11a-13a. But the court was in no position to determine whether the evidence would be too speculative. No discovery has been taken in this case. No evidence has been introduced. Those courts that have actually tried tobacco cases brought by health care payors — in Florida, Minnesota, Washington, and Ohio — have concluded that the plaintiffs did have acceptable damages models.

More fundamentally, the causal complications noted by the Ninth Circuit are not unique to suits by health care payors. The *same* supposed complications would apply to a personal injury product liability suit by individual smokers, whom the court conceded *could* show proximate cause. App. 14a. Indeed, the ability of the Health Trusts to proceed on aggregated statistical proof, rather than individuated proof, *decreases* the causal complications. "In a large population, random variations tend to cancel each other out, yielding an overall observed distribution that is far more useful in evaluating correlations, relationships and probabilities." *Allen v. United States*, 588 F. Supp. 247, 417 (D. Utah 1984), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987).

B. The Decision Below Conflicts With Other Lower Court Decisions.

Review is warranted because of the deep divergence among the lower courts regarding the proper application of the *Holmes* and *AGC* factors in both tobacco and non-tobacco litigation.

1. ***State tobacco litigation.*** The Ninth Circuit's decision conflicts with numerous decisions in the states' litigation against the tobacco industry. Out of more than 40 state suits brought against the cigarette makers on similar legal theories and causal chains, all but one (Indiana) was sustained despite identical arguments that proximate cause was lacking because the injury was too remote or indirect. Twenty-three of the twenty-four courts in which tobacco companies moved to dismiss the states' actions sustained part or all of the complaints. Some of these rulings rested on special state statutes, but many did not and explicitly found the causal chain sufficiently proximate. For example, the court in *Texas v. American Tobacco*, 14 F. Supp.2d 956 (E.D. Tex. 1997), rejected a remoteness claim under *Holmes*, holding that "[w]ith respect to multiple recovery there can be none in this type of action. . . . [T]here can be no better party to prosecute this matter." *Id.* at 968. "With respect to the difficulty in determining damages, . . . difficulty in and of itself does not bar this action. . . . [T]he basic damage allegations provided thus far in the litigation counsel against a finding that this plaintiff is too remote. The

State will attempt at trial to prove damages through the use of statistical evidence presented by way of a 'damage model.' In general, the use of such evidence has been deemed permissible in this type of action." *Id.* In *McGraw v. American Tobacco*, No. 94-C-1707, slip op. at 6 (W. Va. 13th Cir. Feb. 13, 1997), the court refused to dismiss an antitrust claim, explaining: "This Court finds the opinion of *McCready* helpful. When one looks at the facts outlined in that opinion together with the allegations in the complaint, this Court finds dismissal unwarranted and improper." Similarly, the Supreme Court of Minnesota held that Blue Cross and the State of Minnesota had standing to sue the tobacco defendants for antitrust violations and other claims. *Minnesota v. Philip Morris*, 551 N.W.2d 490, 496-97 (Minn. 1996). Although the Minnesota antitrust statute is in some respects broader than its federal counterpart, the court explained that it would have found standing, even for Blue Cross, "[e]ven absent the statutory grant of authority in the antitrust statute." *Id.* at 497 n.1 And a Washington court held that the state would have antitrust standing even without a special statute because dismissal of the claim would leave "an antitrust wrong without a remedy." *Washington v. American Tobacco Co.*, 1996 WL 931316, at *5 (Wash. Super. Ct. 1996).[5]

2. *Suits by other health care payors.* Many courts in cases brought by private health care payors have sustained federal RICO and/or antitrust claims in the face of the same remoteness challenges. For example, in *Blue Cross & Blue Shield of New Jersey v. Philip Morris*, 36 F. Supp.2d 560 (E.D.N.Y. 1999), *recon. denied*, No. 98 CV 1492 (E.D.N.Y. Aug. 2, 1999), Judge Weinstein held that "an analysis of all three [*Holmes*] factors supports the plaintiffs' argument that their

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[5] *See also Alaska v. Philip Morris*, No. 1JU-97-915CI, at 3-4 (1st Jud. Dist. Oct. 9, 1998); *Arizona v. American Tobacco*, No. CV-96-14796, slip op. at 1-3 (Super. Ct. Maricopa Co. May 27, 1997); *Illinois v. Philip Morris*, No. 96L 13146, slip op. at 8-11 (Ill. Cir. Ct. Nov. 13, 1997); *Oregon v. Philip Morris*, No. 9706-04457, slip op. at 4 (Ore. Cir. Ct. Mar. 4, 1998).

injuries were proximately caused by the defendants' pattern of racketeering." *Id.* at 575.

In *National Asbestos Workers Medical Fund v. Philip Morris*, 23 F. Supp.2d 321, 323 (E.D.N.Y. 1998), *recon. denied*, No. 98 CV 3287 (E.D.N.Y. Aug. 2, 1999), Judge Weinstein similarly denied a motion to dismiss on proximate cause and other grounds because "the plaintiffs' claims and defendants' defenses should not be decided in the abstract, but in the context of specific facts which must be developed in the record." He added that the plaintiff's claims "would materially advance the statute's legislative purposes of deterring racketeering, in all its forms, and of remedying, as fully as practicable, the economic consequences of racketeering." *National Asbestos Workers Medical Fund v. Philip Morris*, No. 98 CV 1492, mem. op. at 21 (E.D.N.Y. Sept. 7, 1999).

In *Arkansas Blue Cross & Blue Shield v. Philip Morris*, 47 F. Supp.2d 936 (N.D. Ill. 1999), the court denied the tobacco companies' motion to dismiss a health insurer's claim under *Holmes*. The district court observed that the health insurer was suing for its "own economic injury," not any "derivative" injury. *Id.* at 938. With respect to the measurement of damages, the court concluded that "plaintiffs may well be able to bring reliable statistical and expert evidence to show the percentage of damage caused by defendants' actions." *Id.* at 939. The court also held that there was no danger of duplicative damages or complex apportionment: "the damages claimed in this case are separate from the damages suffered by smokers. Plaintiffs 'seek recovery only for the economic burden of those medical claims and procedures which they directly paid as a result of tobacco use.'" *Id.* "[I]n the present cases Blue Cross is the best, and under some case law perhaps the only, plaintiff who can bring this claim because no other potential plaintiff can claim economic injury." *Id.*[6]

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[6] Subsequently, the defendants in that case moved for reconsideration, citing *Laborers Local 17 Health & Benefit Fund v. Philip Morris*, 172 F.3d 223 (2d Cir. 1999) (discussed *infra*). The district court denied reconsideration, explaining it did not believe "that a motion to dismiss is the time to decide that plaintiffs will not be allowed to present their

In *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris*, 23 F. Supp.2d 771 (N.D. Ohio 1998), the court denied the defendants' motion to dismiss a union health care trust fund case on remoteness grounds. The court held that, "[h]aving found that proving the plaintiffs' damages flowed from defendants' RICO violation is not unduly difficult, and having found there is little risk of double recovery for defendants purported RICO violations, and having found that, if proven, defendants conduct is sufficiently injurious to warrant deterrence, the factors described in *Holmes* suggest this Court not dismiss plaintiffs' RICO counts on standing or proximate cause grounds." *Id.* at 786.[7]

In *Utah Laborers' Health & Welfare Trust Fund v. Philip Morris*, No. 2:98 CV 403B (D. Utah Mar. 31, 1999), the court denied a motion to dismiss the claims of union health care trust funds on remoteness grounds.[8] In *Kentucky Laborers District Council Health & Welfare Trust Fund v. Hill & Knowlton, Inc.*, 24 F. Supp.2d 755, 770 (W.D. Ky. 1998), the court found RICO standing for allegations that the defendants' misrepresentations "prevented the Funds from pursuing proactive measures such as smoking cessation programs and other educational efforts to reduce smoking among the Participants."

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proof," that the court did "not think there is likely to be much difficulty in apportioning damages," and that it disagreed "that plaintiffs are likely to be reimbursed by smokers actions against defendants." *Arkansas Blue Cross & Blue Shield v. Philip Morris*, 47 F. Supp. 2d 936 (N.D. Ill. 1999). Nonetheless, the court stated that it "could not reconcile" the Second Circuit's decision in *Laborers Local 17* with governing Seventh Circuit precedent, citing Marshfield Clinic, and certified the case to the Seventh Circuit under 28 U.S.C. § 1292(b) on the proximate cause question.

[7] The defendants later prevailed at a trial on the merits in *Iron Workers*.

[8] The plaintiff subsequently agreed to the defendants' motion for an interlocutory appeal under 28 U.S.C. § 1292(b). *See also West Virginia Laborers' Fund v. Philip Morris*, No. Civ. 3:97-0708 (S.D.W.Va. Aug. 12, 1998), later voluntarily dismissed (similarly rejecting remoteness objection).

State courts also have rejected the Ninth Circuit's approach to proximate cause. In *Steamfitters Local Union No. 614 Health Fund v. Philip Morris*, No. 92260-2, slip op. (Tenn. Cir. Ct. Jan. 29, 1999), for example, the court denied a motion to dismiss a union health fund's state-law suit on proximate cause grounds, opining that "proximate cause is always to be determined upon the facts of each case." *Id.* at 6.[9] A California state court recently denied a motion to dismiss on remoteness grounds state-law actions by union health and welfare funds. *In re Tobacco Cases II*, JCCP 4042 (San Diego Super. Ct. July 14, 1999). The case is scheduled to go to trial in June 2000.

Review should be granted because the Ninth Circuit's newly minted "directness" rule conflicts with all of these cases. *But see Laborers Local 17 Health & Benefit Fund v. Philip Morris*, 172 F.3d 223 (2d Cir. 1999), amended, 1999 U.S. App. Lexis 19576 (Aug. 18, 1999) (agreeing with Ninth Circuit that "the critical question posed by the direct injury test is whether the damages a plaintiff sustains are derivative of an injury to a third party. If so, then the injury is indirect; if not, it is direct"). The Northern District of Illinois already has observed that the Second Circuit's decision is irreconcilable with Seventh Circuit precedent. See note 6, *supra*.

II. This Court Should Grant Review on the Question of Whether Injunctive Relief is Available to Private Plaintiffs in Civil RICO Actions.

The Ninth Circuit dismissed the plaintiffs' equitable claims under RICO on the sole ground that "'injunctive relief is not available to a private party in a civil RICO action.'" App. 19a (quoting *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1084 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987)). This is an issue that has divided the lower courts for more than a decade, and this Court's review is urgently needed.

Both the Third Circuit and the Fifth Circuit have noted the conflict among the circuits. *See Steamfitters*, App. in No. 99-

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[9] Plaintiff subsequently agreed to defendants' motion for an interlocutory appeal.

545 at 39a n.20 ("circuits are split on the issue"); *Conkling v. Turner*, 18 F.3d 1285, 1296 (5th Cir. 1994) ("our sister circuits appear to disagree on the issue"). Several courts have expressly held that injunctive relief is available in RICO suits brought by private persons,[10] several courts have agreed with the Ninth Circuit,[11] and several courts of appeals have held that the question is an open one.[12] It is intolerable for different cir-

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[10] *E.g., Faircloth v. Finesod*, 938 F.2d 513, 518 n.11 (4th Cir. 1991) ("affirmance includes the permanent injunction forbidding collection of the outstanding note, which was issued pursuant to the district court's authority under 18 U.S.C. § 1964(a)"); *National Organization for Women, Inc. v. Scheidler*, 897 F. Supp. 1047, 1081-83 (N.D. Ill. 1995) (holding that court has authority to award injunctive relief in suit by private plaintiff, under maxim that RICO should be "read broadly"); *Moore v. Farley*, [1988-1990 Transfer Binder] RICO Bus. Disp. Guide (CCH) & 7,236 (W.D. Pa. Mar. 25, 1989) (allowing claim for equitable accounting to survive under RICO because it is not ruled out by statute on its face); *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1541 (W.D. Pa. 1984) ("the drafters of RICO intended for private claimants, as well as the Government, to benefit from the broader forms of relief in furtherance of the purposes behind the Act"); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 909-911 (E.D.N.Y. 1983) (Congress did not intend civil RICO provisions to deprive district court of traditional equitable jurisdiction), *aff'd on other grounds*, 730 F.2d 905 (2d Cir. 1984); *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1014 (S.D. Tex. 1981) (awarding injunctive relief to private plaintiff in RICO suit).

[11] *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) (noting "substantial doubt whether RICO grants private parties ... a cause of action for equitable relief"); *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987, 994 (N.D.Ill.1984) (RICO does not permit equitable remedies such as declaratory judgment and rescission).

[12] *See Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990) (recognizing unsettled state of law: "it is not clear whether injunctive or other equitable relief is available at all in private civil RICO actions"); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989) (whether injunctive relief is available in private civil RICO actions "remains an open question in most . . . courts"); *FDIC v. Antonio*, 843 F.2d 1311, 1313 (10th Cir. 1988) (noting that *Wollersheim* "has been criticized" but expressing

cuits to follow different rules to the same federal statute, especially when injunctions can have multi-state or even nationwide effects which cannot be confined to the geographical area of a single circuit.

The better view is that equitable relief is available in suits brought by private persons. Part (a) of Section 1964 is a broad grant of equitable jurisdiction to the federal courts. There is no reason to hold that this broad reservoir of authority may not be exercised in suits brought by private persons. Part (c) does not expressly limit private plaintiffs only to the enumerated remedies, nor does Part (a) expressly limit the availability of the illustrative equitable remedies to the government. *See* Strafer, Massumi, and Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655, 710 (1982). Indeed, the treble damage clause of Part (c) is preceded by "and shall" rather than "to" — implying that all appropriate relief, including the equitable remedies of Part (a), are available to private plaintiffs because there is no clear statutory limitation. Moreover, even if Part (a) did not confer authority to issue equitable relief, it surely does not withdraw the inherent judicial powers to grant such relief when necessary as a remedy. Because the courts readily implied private remedies at the time Congress considered RICO, Congress should be presumed to have enacted RICO with the knowledge and expectation that similar implied remedies would be made available by the courts, if justice so required. Blakely & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 Notre Dame L. Rev. 526, 544-45 (1987).

Under the Ninth Circuit's view, Part (a) would be rendered a nullity because it would be wholly redundant of Part (b). *See* J. Fricano, *Civil RICO — An Antitrust Plaintiff's Considerations*, in 1 CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 827-28

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no view on the issue); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (suggesting that injunctive relief is available either under RICO or court's general equitable powers), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (*en banc*), *cert. denied*, 464 U.S. 1008 (1983).

(PLI, 1983). Yet Part (a), alone of the subparts of section 1964, is general in theme and apparently unrestricted in application. Its plain words place no limit on the class or category of litigants who might avail themselves of the remedies it makes available under RICO. Although the other subparts of section 1964 provide for specific relief to specific parties, they give no indication that Part (a) is anything other than a simple and broad grant of jurisdiction. *See* Belgard, *Private Civil RICO Plaintiffs Are Entitled to Equitable Relief Under § 1964(a)*, 2 RICO LAW REP. 537, 537-38 (1985).

To be sure, there are differences in language between Part (a) and Part (b). But these differences demonstrate that injunctive relief is available to private persons. Part (b) explicitly grants to the U.S. Attorney General the authority to seek *temporary* equitable relief. Hence, it gives rise to the inference that other parties are permitted to seek *permanent* equitable relief under Part (a).

The Ninth Circuit in *Wollersheim* could not find fault with such a construction of the statutory text. Indeed, it conceded that the interpretation was "certainly a plausible reading of the statutory language." 796 F.2d at 1084. The court of appeals rejected the construction solely on the basis of RICO's legislative history and post-enactment "history." *Id.* at 1086-87. But this Court has made clear the impropriety of using legislative history,[13] and especially rejected legislative proposals,[14] to vary the meaning of statutory text, and it has underscored that "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier Congress.'" *United States v. Texas*, 507 U.S. 529, 535 n.4 (1993); see also *Darby v. Cisneros*, 509 U.S. 137, 153 (1993). And this Court has expressly refused to rely on what the Ninth Circuit deemed decisive — the withdrawal of Rep. Steiger's RICO amendments on the House floor

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[13] *See, e.g., Shannon v. United States*, 512 U.S. 573, 583-84 (1994); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994).

[14] *See, e.g., Central Bank v. First Interstate Bank*, 511 U.S. 164, 186-87 (1994); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

— in the context of determining the statute of limitations for RICO claims. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 155 (1987).

This case is a prime example of the reasons that legislative history should not permitted to override statutory text. As the Ninth Circuit confessed, the "legislative history is silent" concerning the reasons for the omission. *Wollersheim*, 796 F.2d at 1084. For all the Ninth Circuit knew, members of Congress might have declined to adopt specific language authorizing private equitable relief because they believed that § 1964(a) was clear enough. The author of RICO has explained that the withdrawal of certain floor amendments that would have expressly provided for private equitable relief did not signify congressional opposition to the idea. Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMPLE L.Q. 1014, 1020 n.67 (1980).

Furthermore, the legislative history of RICO, taken as a whole, contradicts the Ninth Circuit's view. For example, the House Report explained that, "[a]lthough certain remedies are set out, the list is not meant to be exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons." H.R. Rep. No. 1549, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4407, 4434. Introducing the bill during House debate, the House sponsor, Representative Poff, stated that "[c]ourts are given broad powers under the title to proceed civilly, using essentially their equitable powers, to reform corrupted organizations, for example, by prohibiting the racketeers to participate any longer in the enterprise, by ordering divestitures, and even by ordering dissolution or reorganization of the enterprise." 116 Cong. Rec. 35,295 (1970). *See generally* Wexler, *Civil RICO Comes of Age: Some Maturational Problems and Proposals for Reform*, 35 Rutgers L. Rev. 285, 315 (1983).[15]

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[15] The Ninth Circuit also dismissed plaintiffs' injunctive claims under the antitrust laws for lack of antitrust injury. App. 16a-18a. Review is also warranted on this separate issue because conspiracies to withhold

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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products, to fix product quality, or to suppress advertising on quality have serious anticompetitive effects, and plaintiffs were directly injured thereby. *See California Dental Ass'n v. FTC*, 119 S. Ct. 1604 (1999); *Allied Tube*, 486 U.S. at 500; *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 461 (1986); *Radiant Burners, Inc. v. Peoples Light & Coke Co.*, 364 U.S. 656, 659-60 (1961).

APPENDIX A

OREGON LABORERS-EMPLOYERS HEALTH & WELFARE TRUST FUND; SCHOOL DISTRICT # 1, HEALTH & WELFARE TRUST FUND; PLUMBERS, STEAMFITTERS, & SHIPFITTERS RETIREE HEALTH & WELFARE PLAN, UNITED ASSOCIATION UNION LOCAL 290; LOCAL 11 OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, HEALTH & WELFARE PLAN; LOCAL 125 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 125, EBA-PGE-IBEW LOCAL 125 HEALTH & WELFARE TRUST,

PLAINTIFFS-APPELLANTS,

v.

PHILIP MORRIS INCORPORATED; RJ REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; BRITISH AMERICAN TOBACCO COMPANY LTD; BAT INDUSTRIES PLC; LORILLARD TOBACCO COMPANY; LIGGETT GROUP INCORPORATED; AMERICAN TOBACCO COMPANY; UNITED STATES TOBACCO COMPANY; COUNCIL FOR TOBACCO RESEARCH USA INCORPORATED; TOBACCO INSTITUTE INCORPORATED; SMOKELESS TOBACCO COUNCIL INCORPORATED; HILL & KNOWLTON INCORPORATED,

DEFENDANTS-APPELLEES.

98-36024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

185 F.3d 957
May 3, 1999, Argued and Submitted, Portland, Oregon
July 14, 1999, Filed

JUDGES: Before: William C. Canby, Jr., Thomas G. Nelson, Circuit Judges, and Jeremy Fogel, District Judge.[1]

T.G. NELSON, Circuit Judge:

The plaintiffs in this action are six Oregon-based employee health and welfare benefit trust plans created to provide comprehensive health care benefits to their participants, who are thousands of union and public-sector workers employed under various collective bargaining agreements. Plaintiffs filed suit against defendants - eight tobacco companies, three non-profit public relations/lobbying/research councils and one public relations firm - under federal RICO, Oregon RICO, federal and state antitrust laws, and other Oregon state laws. Plaintiffs seek to recover the costs they have incurred treating their participants' and beneficiaries' smoking-related illnesses. The district court granted judgment on the pleadings in favor of defendants, concluding that plaintiffs had failed to state a claim upon which relief could be granted. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

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[1] Honorable Jeremy Fogel, United States District Court Judge for the Northern District of California, sitting by designation.

I.

Plaintiffs are five health and welfare trust funds that provide health care benefits to their participants and beneficiaries. These funds are formed and operated as legal trusts with each trust's mission being to pay for health care benefits for participating workers, retirees and their families.

In their complaint, plaintiffs allege the following: In the early 1950's, scientific studies linking smoking to health risks surfaced. Defendants concluded that an awareness of the health risks associated with smoking could result in regulation of the tobacco industry and threaten the industry's profitability. To prevent this from happening, defendants began a public relations campaign to persuade the public that the industry would research the health risks from tobacco and make a candid disclosure of the results. Defendants, however, entered into a conspiracy to do just the opposite.

Plaintiffs' complaint cites many examples of this alleged public relations campaign that was being waged at the same time that defendants were allegedly engaged in a covert scheme to defraud the public (including plaintiffs) as to the health risks of smoking. Defendants allegedly sought to conceal the scientific evidence about smoking risks and to maintain the powerful "lie" that the link between smoking and disease was an "open controversy." Defendants' alleged misconduct covered not only the general smoking-disease link, but also the degree of the health risk, the addictiveness of smoking, the feasibility of safer cigarettes, the actual safety of low-tar and filtered cigarettes, and the suppression of comparative safety information about different product designs. Defendants also allegedly sought to impair the de-

velopment and implementation of smoking cessation programs, and fought efforts to ban smoking in the workplace.

Plaintiffs also allege that defendants conspired to restrain intercompany competition in making and marketing safer cigarettes or alternative products. Defendants allegedly stopped advertising differences in product safety, fixed the quality level of products allowed in the market, suppressed product information, and policed their agreement not to let any manufacturer introduce and market tobacco products that were safer or less hazardous. Plaintiffs allege that this conduct presents a classic case of horizontal conspiracy to fix product quality and that, as a result, cigarettes are perhaps the only product that has not gotten any safer in the last forty-five years. Finally, plaintiffs allege that defendants targeted teen smokers to replace the adult smokers that died.

As to damages, plaintiffs allege that defendants' wrongdoing injured them in two causal chains. First, defendants' alleged manipulation of information and suppression of products prevented plaintiffs from obtaining accurate information and safer products in operating their health funds, which in turn prevented plaintiffs from taking action to reduce smoking rates among their participants. This reduction in smoking rates would have led to a reduction in smoking-related disease among the funds' participants which would have in turn led to lowering plaintiffs' expenditures. Second, plaintiffs allege that defendants' wrongful fraud and concealment of information, suppression of safer products, targeting of children and manipulation of nicotine resulted in more smoking, less quitting, and smoking of more hazardous cigarettes among the funds' participants, which in turn resulted in higher incidence of disease and higher expenditures for medical bills by plaintiffs.

Plaintiffs allege that, but for defendants' conduct, plaintiffs would have undertaken stronger anti-smoking measures. Plaintiffs further allege that they have borne the brunt of smoking-related health care costs and that plaintiffs simply seek to replenish trust assets by recovering from defendants the injuries that plaintiffs have suffered as a result of defendants' misconduct.

Plaintiffs have asserted the following claims for relief: federal RICO, Oregon RICO, federal and state antitrust, Oregon's Unfair Trade Practices Act ("UTPA"), fraudulent misrepresentation and concealment, unjust enrichment, negligent breach of a special assumed duty and civil conspiracy. Plaintiffs seek damages as well as equitable and injunctive relief.

Defendants moved the district court for judgment on the pleadings on each of plaintiffs' claims or, alternatively, for dismissal for failure to join necessary parties. The district court granted defendants' motion, finding plaintiffs failed to state a claim on which relief could be granted. *See Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 17 F. Supp. 2d 1170 (D. Or. 1998).

The district court held (1) that plaintiffs did not meet the standing or proximate cause requirements necessary to maintain either a federal or state antitrust claim; (2) that plaintiffs' injuries were entirely dependent upon injuries sustained by their participants and were thus too far removed from the challenged harmful conduct to support either a federal or state RICO claim;[2] (3) that plaintiffs did not meet the

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[2] The district court held that plaintiffs also lacked standing under Oregon RICO because they failed to allege that defendants have been convicted of mail or wire fraud as required under Oregon RICO. 17

standing requirement of Oregon UTPA because they were not "consumers of defendants' products"; (4) that plaintiffs did not meet the proximate cause requirements to maintain a claim for fraud; (5) that the theories of unjust enrichment and indemnity were inapplicable; (6) that plaintiffs failed to allege the elements necessary to maintain a claim for breach of an assumed duty;[3] n3 and (7) that plaintiffs' claim for civil conspiracy was entirely dependent on the underlying claims for fraud and UTPA violations and must therefore also fail.

II.

We review de novo a district court's grant of judgment on the pleadings for failure to state a claim. *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir. 1998). "A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *Id.*

III.

A. RICO and Antitrust Claims for Damages

The requirements for standing to maintain a civil action under RICO and the antitrust laws are similar.[4] *See Holmes v.*

F. Supp. 2d at 1179 (citing Or. Rev. Stat. § 166.725(7)(a)(A)). Plaintiffs have not appealed the district court's dismissal of their Oregon RICO claim. This claim is therefore waived.

[3] Plaintiffs have not appealed the dismissal of their claim for breach of an assumed duty. This claim is therefore waived.

[4] Plaintiffs assert claims under both federal and state antitrust laws. The Oregon antitrust statutes are almost identical to the federal antitrust statutes. Compare 15 U.S.C. §§ 1, 2 with Or. Rev. Stat. §§ 646.725, 646.730. In fact, Oregon courts look to federal antitrust decisions for

Securities Investor Protection Corp., 503 U.S. 258, 268, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992). Both provide a private right of action for damages only to those individuals "injured in [their] business or property by reason of" a violation of the law's substantive provisions. 18 U.S.C. § 1964(c) (RICO); 15 U.S.C. § 15(a) (antitrust). Both also require that the alleged violation of the law be a "proximate cause" of the injury suffered. *See Holmes, 503 U.S. at 268 (RICO); Blue Shield v. McCready*, 457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982) (antitrust). As the Court explained in *Holmes*:

> Here we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient. Accordingly, among the many shapes this concept took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged.

503 U.S. at 268 (citations and quotations omitted) (emphasis added).

"persuasive" guidance in interpreting the state antitrust laws. *See Willamette Dental Group, P.C. v. Oregon Dental Serv. Corp.*, 130 Ore. App. 487, 882 P.2d 637, 640 (Or. Ct. App. 1994) (citing Or. Rev. Stat. § 646.715(2)). The district court and the parties have treated the state and federal antitrust claims as one and the same for purposes of standing analysis. We do the same.

A direct relationship between the injury and the alleged wrongdoing, although not the "sole requirement" of RICO and antitrust proximate causation, "has been one of its central elements." 503 U.S. at 269 (*citing Associated Gen. Contractors v. California State Council of Carpenters* ("AGC"), 459 U.S. 519, 540, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)). "Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." 503 U.S. at 268-69.

To determine whether an injury is "too remote" to allow recovery under RICO and the antitrust laws, the Court applies the following three-factor "remoteness" test: (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries. *See id.* at 269-70 (RICO); AGC, 459 U.S. at 545 (antitrust).

Plaintiffs in the present case assert that they have suffered both "direct" injury and "indirect" injury. They claim a "direct" injury based on what they call a "one-link" causation chain. As defendants point out, however, all of plaintiffs' claims rely on alleged injury to smokers - without any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers. Thus, there is no "direct" link between the alleged misconduct of defendants and the alleged damage to plaintiffs. *See Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 172 F.3d 223, 233 (2d Cir. 1999) (holding that be-

cause trust funds' damages "are entirely derivative of the harm suffered by plan participants as a result of using tobacco products," the damages were "indirect" and did not "proximately cause the injuries alleged" by the trusts); *see also Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 928 (3d Cir. 1999) (holding that it did not matter whether plaintiffs' injuries were "direct" or "indirect" because "the plaintiffs' direct claim comes no closer than their indirect claim to meeting the proximate cause requirement for antitrust standing").

Two circuit courts have addressed the issue of a health trust fund's standing to bring antitrust and RICO actions. Both the Second and the Third Circuits have held that a trust fund's claims are "too remote" to allow recovery and that the actions are therefore barred. *See Laborers Local 17*, 172 F.3d 223 (addressing only RICO); *Steamfitters*, 171 F.3d 912 (addressing RICO and antitrust).

Because we determine that the "remoteness" test weighs in favor of barring plaintiffs' action, we agree with the Second and the Third Circuits and hold that plaintiffs' RICO and antitrust claims are "too remote" from defendants' alleged wrongdoing to allow recovery. These claims are therefore barred.

1. Existence of More Direct Victims of Alleged Wrongful Conduct

Plaintiffs argue that their "standing is confirmed" because only they, and not smokers, "can allege injury to business or property for the RICO and antitrust claims at issue here."

Plaintiffs are correct that individuals that suffer personal injury cannot claim medical expenses as "injury to business

or property," and that the smokers are therefore barred from asserting RICO or antitrust claims. *See Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) (holding that personal injury is not "injury to business or property" and is therefore not compensable under RICO). This inability does not, however, necessarily lead to the conclusion that plaintiffs must therefore have standing.

First, "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *AGC*, 459 U.S. at 534. Some injuries caused by an antitrust violation may thus be left unremedied for lack of a proper plaintiff. As we recognized in *Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc.*, 788 F.2d 574, 580 n.7 (9th Cir. 1986): "The fact that injury has occurred and that other claims have failed does not permit this court to expand the coverage of [antitrust law]."

Second, there is an identifiable group of persons - smokers - whose self-interest will motivate them to seek recovery of the damages caused by defendants' alleged wrongful conduct. Although the smokers cannot "vindicate the public interest in antitrust [or RICO] enforcement," *see AGC*, 459 U.S. at 542, they can "remedy the harm done by defendants' alleged misconduct. Moreover, these actions [by the smokers] will promote 'the general interest in deterring injurious conduct,' which Holmes noted as the objective of this policy factor." Laborers Local 17, 172 F.3d at 235 (quoting *Holmes*, 503 U.S. 258 at 269).

The existence of the smokers, who are more direct victims of the alleged wrongful conduct and who can be counted on to vindicate the injury caused by defendants' alleged wrong-

ful conduct, weighs heavily in favor of barring plaintiffs' actions.

2. Difficulty in Ascertaining Damages Attributable to Defendants' Alleged Wrongful Conduct

Although the actual damages attributable to medical payments made by plaintiffs due to smoking-related injuries would be as easy to ascertain in the present case as in a direct action by the smokers, the other damages that plaintiffs allege would be very difficult to ascertain. As the Third Circuit stated:

> The Funds' alleged damages are said to arise from the fact that the tobacco companies prevented the Funds from providing smoking-cessation or safer smoking information to their participants, some of whom would have allegedly quit smoking or begun smoking safer products, reducing their smoking-related illnesses, and thereby lowering the Funds' costs for reimbursing smokers' health care expenditures. In order to calculate the damages - i.e., the costs not lowered due to the antitrust conspiracy - the Funds must demonstrate how many smokers would have stopped smoking if provided with smoking-cessation information, how many would have begun smoking less dangerous products, how much healthier these smokers would have been if they had taken these actions, and the savings the Funds would have realized by paying out fewer claims for smoking-related illnesses.

> It is apparent why the Funds argue that they can demonstrate all of this through aggregation and statistical modeling: it would be impossible for them to do so otherwise. Yet we do not believe that aggregation and statistical modeling are sufficient to get the Funds over the hurdle of the AGC factor focusing on whether the "damages claim is . . . highly speculative."

Steamfitters, 171 F.3d at 929.

The Second Circuit similarly found the damages claim of the trust funds to be highly speculative:

> It will be virtually impossible for plaintiffs to prove with any certainty: (1) the effect any smoking cessation programs or incentives would have had on the number of smokers among the plan beneficiaries; (2) the counter-effect that the tobacco companies' direct fraud would have had on the smokers, despite the best efforts of the Funds; and (3) other reasons why individual smokers would continue smoking, even after having been informed of the dangers of smoking and having been offered smoking cessation programs. On a fundamental level, these difficulties of proving damages stem from the agency of the individual smokers in deciding whether, and how frequently, to smoke. In this light, the direct injury test can be seen as wisely limiting standing to sue to those situations where the chain of causation leading to damages is not

> complicated by the intervening agency of third parties (here, the smokers) from whom the plaintiffs' injuries derive.
>
> These concerns become particularly pointed in a case, like the present one, where the injuries are alleged to derive not simply from defendants' affirmative misconduct but also from plaintiffs' fraudulently induced inaction. That is, it is often easier to ascertain the damages that flow from actual, affirmative conduct, than to speculate what damages arose from a party's failure to act. In the latter situation, as in the case at hand, it becomes difficult to distinguish among the multitude of factors that might have affected the damages. Here, for example, plaintiffs' alleged damages might have derived from inefficiencies in the Funds' own management, as well as from non-smoking related health problems suffered by the smokers, and it would be the sheerest sort of speculation to determine how these damages might have been lessened had the Funds adopted the measures defendants allegedly induced them not to adopt. *Laborers Local 17*, 172 F.3d at 233-34.

The difficulty of ascertaining the damages attributable to defendants' alleged wrongful conduct and the complexity involved in calculating these damages weigh heavily, if not dispositively, in favor of barring plaintiffs' actions.

3. Potential for Duplicative Recovery or Complex Apportionment of Damages

This third and final factor also weighs in favor of barring plaintiffs' actions. It is quite likely that if there are not cases by smokers already pending in Oregon, there will likely be many filed as has been seen in other states. Although the smokers cannot recover under either RICO or the antitrust laws, they can seek recovery under other state law theories for person injury and the associated medical costs - the same damages that plaintiffs seek to recover. Moreover, although there may be some protection from multiple recovery in state law, this safeguard would not cure the ultimate problem - that the courts would be forced "to adopt complicated rules apportioning damages among plaintiffs at different levels of injury form the violative acts, to obviate the risk of multiple recoveries." *See Holmes*, 503 U.S. at 269 (*citing AGC*, 459 U.S. 519 at 543-44); *Laborers Local 17*, 172 F.3d at 230.

All three factors of the "remoteness" test weigh in favor of barring plaintiffs' claims. We therefore hold that plaintiffs lack standing to bring either a RICO or an antitrust claim for damages.[5]

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[5] Plaintiffs' argument that their standing to bring RICO and antitrust actions is "confirmed" by state and common law rules governing proximate cause, as well as trust law, ignores the test set out by the Supreme Court for analyzing standing in RICO and antitrust cases. This argument also ignores the fact that there is an alternative route for the trusts to recover the damages alleged in the present action - via subrogation in a non-RICO, non-antitrust action. *See Laborers Local 17*, F.3d at 235.

B. RICO and Antitrust Claims for Equitable Relief

In addition to damages, plaintiffs seek equitable relief under RICO and the antitrust laws.

1. Antitrust

Standing analysis for equitable relief under the antitrust laws is not the same as standing analysis for damages. *See Cargill, Inc. v. Monfort , Inc.*, 479 U.S. 104, 110-11, 93 L.Ed. 2d 427, 107 S. Ct. 484 & nn. 5-6 (1986). As the Court explained *in Cargill*:

> The fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one. Thus, because standing [for damages] raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing [for damages] are not relevant [to a determination of standing for equitable relief].

Id. at 111 n. 6 (citation and quotation omitted) (emphasis added).

Thus, plaintiffs may not have to meet all three factors in the "remoteness" test to maintain an action for antitrust injunctive relief. Plaintiffs do, however, still have to show antitrust injury - either real or threatened. *See id.* at 111-13. This requirement "ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place." *ARCO v. USE Pe-*

troleum Co., 495 U.S. 328, 342, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990).

An "antitrust injury" is an injury of "the type that the antitrust statute was intended to forestall." *AGC*, 459 U.S. at 540. "The antitrust laws ... were enacted for the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) (quotation omitted). "The requirement that the alleged injury be related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors." *Bhan v. NME Hosps., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985). "In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987).

In their complaint, plaintiffs define the antitrust market at issue as the market for cigarettes and tobacco products. Plaintiffs are neither consumers nor competitors in that market. They are not, therefore, "participants in the same market" as defendants, and they have thus not suffered "antitrust injury." S, 772 F.2d at 1470; *see also Steamfitters*, 171 F.3d at 926.

Plaintiffs' reliance on *McCready* to argue that "there is no 'consumer' or market participant requirement," is misplaced. The plaintiff in *McCready* filed an antitrust action against Blue Shield, claiming that Blue Shield's "practice of refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists, was in furtherance of an un-

lawful conspiracy to restrain competition in the psychotherapy market." 457 U.S. at 467. The Court held that the plaintiff, as a subscriber who had employed the services of a psychologist and thus a consumer of psychotherapy services, had standing to maintain the antitrust action. *See* 457 U.S. at 480-81, 484-85. The Court did not hold that there is no "consumer" or "market participant" requirement.

The present case is distinguishable from *McCready* in several aspects. First, the plaintiff in *McCready* was a consumer in the relevant market of "psychotherapeutic services." *See* 457 U.S. at 483. In contrast, it is undisputed that plaintiffs in the present case are neither "consumers" nor "competitors" in the relevant market of cigarettes and tobacco products.

Second, the Court has explained that the broad language it used in *McCready*[6] n6 was simply a paraphrase of the antitrust laws and "added nothing to the even broader language that the statute itself containing." *See AGC*, 459 U.S. at 529 & n.19. In so explaining, the Court noted that the actual plaintiff in McCready was directly harmed by the defendants' unlawful conduct. *See id.*

In contrast, plaintiffs' own argument in the present case reveals that they were not directly harmed by defendants' allegedly unlawful conduct, but rather that any harm they

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[6] In *McCready*, the court stated: "As we have recognized, 'the statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." 457 U.S. at 472.

suffered is derivative of the harm suffered by smokers.[7] As the Third Circuit stated:

> It is true that, drawing on the language from McCready, we have sometimes expressed the injury requirement in terms of the harm being "inextricably intertwined" with the defendant's wrongdoing. The simple invocation of this phrase, however, will not allow a plaintiff to avoid the fundamental requirement for antitrust standing that he or she have suffered an injury of the type - almost exclusively suffered by consumers or competitors - that the antitrust laws were intended to prevent.

Steamfitters, 171 F.3d at 926 n.8 (citations omitted).

Plaintiffs have failed to allege an injury of the type that the antitrust laws were intended to prevent. Plaintiffs are neither consumers nor competitors in the relevant market of cigarettes and tobacco products. To the extent they have suffered injury, their claims are entirely derivative of the injuries suffered by smokers. Their injuries are not of a nature to establish standing for equitable relief under the antitrust laws.

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[7] Plaintiffs argue that their injuries are "inextricably intertwined with that of market participants (smokers deprived of a choice of a safer product) in that the Trust paid the bills resulting from the restraint."

2. RICO

"Injunctive relief is not available to a private party in a civil RICO action." *Religious Tech. Ctr. v. Wollershseim*, 796 F.2d 1076, 1084 (9th Cir. 1986).

C. State Law Claims

1. Unfair Trade Practices Act

The UTPA grants standing to "any person who suffers any ascertainable loss of money" resulting from a violation of the law. Or. Rev. Stat. § 646.638(1). Damages predicated upon "personal injury" are not recoverable under the UTPA. *See Gross-Haentjens v. Leckenby*, 38 Ore. App. 313, 589 P.2d 1209, 1211 (Or. Ct. App. 1979) (holding the UPTA does not cover personal injuries). Plaintiffs' damages - expenses to treat smokers' personal injuries - are clearly predicated upon "personal injury" and are therefore unrecoverable under the UPTA.

Moreover, "the UTPA is to be construed consistently with its consumer protective purposes." *Cullen v. Investment Strategies, Inc.*, 139 Ore. App. 119, 911 P.2d 936, 941 (Or. Ct. App. 1996); *see also Raudebaugh v. Action Pest Control*, 59 Ore. App. 166, 650 P.2d 1006, 1008-09 (Or. Ct. App. 1982) (noting that the purpose of UTPA is to "provide a viable remedy for consumers" and if "there is an ascertainable loss to a consumer, that consumer has a cause of action" under UTPA). This emphasis on direct protection of consumers suggests that the UTPA, like the other statutes that we have discussed, is not intended to provide a cause of action to a non-consumer that is wholly derivative of injury to consumers.

2. Fraud

The Oregon Supreme Court recognizes the prevailing rule "that a plaintiff may not receiver for economic loss resulting from negligent infliction of bodily harm to a third person," *Ore-Ida Foods, Inc. v. Indian Head Cattle Co.*, 290 Ore. 909, 627 P.2d 469, 473 (Or. 1981), and has extended this rule to loss resulting from fraudulent misrepresentation. *See Oksenholt v. Lederle Lab.*, 294 Ore. 213, 656 P.2d 293, 299 (Or. 1982) (holding that claim for indemnity is a claim for recovery for economic loss that results from physical harm to a third person and is barred in both a negligence and fraudulent misrepresentation action under *Ore-Ida*).

In the present case, plaintiffs seek only to recover medical costs paid on behalf of their beneficiaries. This is a classic claim for indemnity, with plaintiffs attempting to recover for the economic loss they have suffered as a result of the physical harm suffered by third parties - the smokers. Under *Ore-Ida* and *Oksenholt*, this claim for damages is barred.

Moreover, for the same reasons that proximate cause did not exist for plaintiffs' RICO and antitrust claims, proximate cause is lacking for their fraud claim. *See Oksenholt*, 656 P.2d at 299 ("Damages properly recoverable in an action for intentional misrepresentation are those which are a direct and necessary result of defendant's acts or omissions.").

3. Unjust Enrichment

Under Oregon law, to state a cause of action for unjust enrichment, plaintiffs must show that they conferred a "benefit" on defendants and that it would be unjust for defendants to retain that benefit. *See L.S. Henriksen Constr., Inc. v. Shea*,

155 Ore. App. 156, 961 P.2d 295, 296-97 (Or. Ct. App. 1998).

Plaintiffs allege that they conferred a "benefit" on defendants by paying the medical bills of the smokers. Plaintiffs do not, however, allege that defendants had any legal obligation to pay the medical expenses of the smokers. Without a legal obligation on the part of defendants to pay, the payment by plaintiffs did not "benefit" defendants.

Moreover, because plaintiffs had an independent obligation to pay the smokers' medical expenses, they cannot maintain an action for unjust enrichment against defendants just because defendants were incidentally benefitted. *See* Restatement of Restitution ' 106 (1936) ("A person who, incidentally to the performance of his own duty ... had conferred a benefit upon another, is not thereby entitled to contribution.")

4. Civil Conspiracy

Plaintiffs' claim for civil conspiracy is entirely dependant on their underlying claims for fraud and violation of UTPA. Because these underlying claims fail, plaintiffs' civil conspiracy claim must also fail.

IV.

As the district court stated:

> However compelling [plaintiffs'] charges may be, there are very sound judicial policy reasons for limiting legal actions to those parties most directly injured by the harmful conduct. These policies are not new and have lengthy

> historical roots in our jurisprudence. To allow plaintiffs to maintain actions that are entirely dependent upon the harm suffered by others threatens chaos for the judicial system, especially where others may (and have) filed their own actions and are capable of recovering a full range of damages, including the medical costs sought here. 17 F. Supp. 2d at 1183.

The district court's grant of judgment on the pleadings in favor of defendants is AFFIRMED.

APPENDIX B

OREGON LABORERS-EMPLOYERS HEALTH & WELFARE TRUST FUND, et al., Plaintiffs,

v.

PHILIP MORRIS, INC., et al., Defendants.

Civil No. 97-1051-MA

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

17 F. Supp. 2d 1170

August 24, 1998, Decided
August 24, 1998, Filed, Entered on the Docket

Malcolm F. Marsh, United States District Judge.

OPINION & ORDER (corrected)

Plaintiffs are six employee health and welfare benefit plans created to provide comprehensive health care benefits to participants who are employed under various collective bargaining agreements. Plaintiffs are either self-insured or purchase insurance from insurance companies and pay for the health care benefits or insurance premiums from contributions made by participants and their employers. Plaintiffs filed this action against eight tobacco companies, three non-profit public relations/lobbying/research councils and one public relations firm seeking to recover expenditures plaintiffs have incurred for medical assistance allegedly due

to the use of tobacco by plaintiffs' participants and beneficiaries. Plaintiffs claim that their "infrastructure" has been damaged because of medical claims it has paid for tobacco-related illnesses. During oral argument, plaintiffs clarified that the alleged damage to their infrastructure is limited to the diminishment of the trusts' corpus based upon the payment of medical claims. Plaintiffs do not contend that their administration or management has suffered any independent harm.

Plaintiffs generally allege that, since the early 1950s, defendants have engaged in a conspiracy to thwart and delay public entity efforts to restrict cigarette use and limit cigarette sales. Plaintiffs further allege that defendants assumed a duty to the public to research the health impacts of tobacco use and then failed to release that research and misrepresented what they knew about the health dangers of tobacco use, nicotine addiction and the industry's ability to manipulate nicotine levels. Plaintiffs also allege that defendants conducted research into the development of "safer" cigarettes but refused to utilize such research and discouraged each other from pursuing such a course for fear that such products would constitute an admission of liability. Finally, plaintiffs contend that defendants researched youth smoking habits and specifically targeted underaged smokers through extensive advertising, knowing that children who smoke are more likely to become addicted, long term smokers.

Plaintiffs assert twelve claims for relief: (1) federal RICO, (2) Oregon RICO; (3) - (4) violations of the Sherman Act; (5) - (6) violations of Oregon's antitrust Act; (7) violations of Oregon's Unfair Trade Practices Act (UTPA); (8) fraudulent misrepresentation and concealment; (9) unjust enrichment; (10) negligent breach of a special assumed duty; (11) civil

conspiracy and (12) indemnity. Defendants[1] move for judgment on the pleadings against each claim, and alternatively, seek dismissal for failure to join necessary parties. For the reasons which follow, defendants' motion is granted.

Standard

"A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Nelson v. City of Irvine*, 143 F.3d 1196, 1199 (9th Cir. 1998).

Discussion

Defendants seek judgment on the pleadings against all claims based upon the remote nature of the asserted injury to the defendants' allegedly wrongful actions. Defendants also point out individual defects with plaintiffs' claim and seek judgment on the pleadings on those alternative grounds as well.

The threshold question presented with most of the claims is that of proximate causation. Proximate causation involves two distinct elements: (1) a policy element that encompasses concepts of equity and standing (where a plaintiff stands in relation to a defendant's harmful conduct); and (2) foreseeability. Although sometimes referred to as the "remoteness"

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[1] Defendants Philip Morris and RJR filed the motion on behalf of all other named defendants except Liggett Group, Inc., the Smokeless Tobacco Council and the Tobacco Institute. Liggett filed a separate memorandum joining the motion. At oral argument, the Smokeless Tobacco Council and the Tobacco Institute indicated that they did not join in the pending motions.

doctrine or standing, the first element limits relief to those most directly injured by a defendant's conduct.

The second element of foreseeability requires that a harm be a reasonably anticipated consequence of the defendant's actions. For purposes of this motion, there is no question that any harm plaintiffs may have suffered was a reasonably foreseeable consequence of their participants' use of tobacco products. Thus, the primary issue I must resolve is whether plaintiffs' claims are too remote from the defendants' allegedly wrongful activities under the policy element of the proximate causation doctrine.

Both parties have submitted copies of numerous unpublished decisions from other jurisdictions which address many of the same issues presented here in cases filed against these same defendants. These decisions demonstrate that the complaint in this case is not unique. They also show, in part, how and why the complaint was carefully drafted to respond to the deficiencies noted in the numerous dismissal orders. This action is clearly part of a national effort to utilize recent disclosures about the tobacco industry's research and development, marketing practices and statements to the FDA and Congress as the basis for shifting health care and other related costs to the tobacco industry.

Tobacco related decisions from other jurisdictions break down into four groups: (1) cases filed by states; (2) cases filed by individuals; (3) cases filed by insurers; and (4) cases filed by pension funds. Although some of the holdings bear some guidance on the issues presented here, the threshold question of remoteness or, what is in reality a question of proximate causation, varies greatly depending upon the party prosecuting the action. Thus, for example, the cases filed by

State Attorneys General materially differ on the issue of proximate causation given the state's unique role relative to protection of its citizens, statutes governing Medicaid recoupment and certain state statutes that expressly permit states to maintain actions on behalf of their citizenry. It is for this reason that I find those decisions involving other pension funds more persuasive than decisions involving states or individuals.

While proximate causation is a dispositive issue for the antitrust, RICO and fraud claims, other claims face comparable but unique barriers to relief. The following is a count by count analysis of those claims.

Antitrust

Plaintiffs allege that defendants have conspired to restrain trade in violation of Section 1 of the Sherman Act by keeping safer tobacco alternatives out of the market, artificially inflating the price of tobacco products and causing millions to purchase tobacco products when they would not have otherwise done so but for defendants' conspiracy. Plaintiffs assert that this conspiracy was undertaken with the "express purpose" of imposing health care costs upon the plaintiffs. Plaintiffs also allege a conspiracy to monopolize the tobacco market in violation of Section 2 of the Sherman Act by stifling entry of new competitors and suppressing new product development. Plaintiffs assert that they are in the "target area" of defendants' unlawful conduct because "the market for tobacco products and the market for health care are inextricably intertwined."

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy,

in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." To sustain a claim under Section 1, plaintiffs must allege: (1) an agreement or conspiracy; (2) resulting in an unreasonable restraint of trade, and (3) causing antitrust injury. *Hahn v. Oregon Physicians' Service*, 868 F.2d 1022, 1026 (9th Cir. 1988), cert. denied, 493 U.S. 846, 107 L. Ed. 2d 99, 110 S. Ct. 140 (1989).

To support a claim under Section 2 of the Sherman Act, plaintiffs must allege "an objective to monopolize or attempt to monopolize any part of the trade or commerce among the several states or with foreign nations." *Western Concrete Structures Co., Inc. v. Mitsui & Co.*, 760 F.2d 1013, 1017-18 (9th Cir.), cert. denied, 474 U.S. 903, 88 L. Ed. 2d 229, 106 S. Ct. 230 (1985).[2]

Whether certain activity constitutes an illegal restraint of trade is generally determined under a "rule of reason" analysis, "that is, the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be

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[2] Plaintiffs assert claims under federal and Oregon antitrust statutes. Oregon laws, O.R.S. 646.725 and 646.730, are nearly identical to the Sherman Act, sections 1 and 2. Chapter 646.715(2) requires that state courts look to federal case law for guidance and Oregon courts have adopted the federal per se and rule of reason analyses. *Northwest Medical Laboratories, Inc. v. Blue Cross and Blue Shield of Oregon, Inc.*, 310 Ore. 72, 81, 794 P.2d 428 (1990); *see also Willamette Dental Group, P.C. v. Oregon Dental Service Corp.*, 130 Ore. App. 487, 492, 882 P.2d 637 (1994) (noting that Oregon looks to federal antitrust decisions for "persuasive guidance"), rev. den. 320 Ore. 508, 888 P.2d 569 (1995). Neither party has suggested that the analysis for the Oregon antitrust claims should differ from that of the federal. Thus, I will consider the state and federal antitrust claims within a single inquiry.

prohibited as imposing an unreasonable restraint on competition." *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 843 (9th Cir.), cert. denied, 519 U.S. 868, 136 L. Ed. 2d 120, 117 S. Ct. 181 (1996). Under the rule of reason, "plaintiff must establish 'antitrust injury,' that is, the conduct at issue actually caused injury to competition beyond the impact on the claimant, within a field of commerce in which the claimant is engaged." *Id.* (emphasis added).

The Ninth Circuit has held that the antitrust laws were designed to prevent "antitrust injury," noting that "the antitrust laws are intended to preserve competition for the benefit of consumers in the market in which competition occurs." *Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1375 (9th Cir. 1996), cert. denied, 520 U.S. 1119, 137 L. Ed. 2d 333, 117 S. Ct. 1252 (1997). On this basis, the court upheld the dismissal of an antitrust claim filed by an employee allegedly fired because he refused to participate in his employer's anti-competitive scheme. The court further found that antitrust standing should be limited to actual participants in the same market as the "alleged malefactors." 80 F.3d at 1376.

In Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983), a labor union filed an action against a multiemployer association and its members asserting that the defendants coerced third parties into entering into contracts with nonunion firms and that such activity constituted an illegal restraint of trade under Section 4 of the Clayton Antitrust Act. The Court assumed that the alleged coercive activity could in fact constitute a restraint of trade. However, the Court held that the union was not a proper

party despite the broad standing language of the Clayton Act[3]. The Court examined the legislative history of the Sherman Act and determined that "Congress intended the Act to be construed in the light of its common law background." *Id.* at 530. The Court looked to common law principles of proximate causation and noted that application of those principles made any "black letter" rules impossible, suggesting the requirement of a case-by case analysis. *Id.* at 534. The Court articulated several factors to guide the analysis: (1) the directness or indirectness of the causal connection between the asserted wrong and the harm suffered; (2) whether the defendants intended to cause the harm; (3) whether the nature of the plaintiffs' injury was of a type that Congress sought to address; (4) whether there were other persons motivated to vindicate the public's interest in antitrust enforcement; (5) whether the harm asserted was speculative; and (6) the risk of duplicative recoveries or "the danger of complex apportionment of damages." Applying these principles, the Court held that even though the union alleged that defendants intended to harm it directly, the pleadings were insufficient to sustain proximate cause or antitrust injury as a matter of law given the "tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury," the potential of duplicative recovery or complex apportionment and the existence of more direct victims. *Id.* at 545. The Court noted

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[3] Section 4 of the Clayton Act provides in relevant part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . ."

that the union failed to specify its injury, but concluded that any possible injury theory was too indirect. *Id.* at 541, n.46.[4]

For purposes of this motion, I have assumed without deciding that plaintiffs have adequately alleged the existence of a conspiracy to restrain trade and an attempt to monopolize. However, there is no question that plaintiffs are not participants in the tobacco market. While plaintiffs allege that the tobacco and health care markets are "inextricably intertwined," the parties have not cited nor have I been able to find any authority to support the extension of antitrust injury to unrelated but "intertwined" markets.

In addition, plaintiffs fail to meet the proximate causation standard set forth in Associated General Contractors. Any injury plaintiffs suffered is attenuated from the defendants' allegedly anti-competitive conduct and is highly speculative, at best. To establish causation on the first element of its claims, plaintiffs would have to show that had defendants produced safer cigarettes, or allowed others to do so, plaintiffs' participants would have purchased them and would have suffered fewer health care costs resulting in a savings to the plaintiffs. To establish causation on the other elements of plaintiffs' antitrust claims, plaintiffs would have to show that had defendants fully disclosed what they knew about the dangers of smoking and the addictiveness of nicotine, plaintiffs' participants would not have consumed tobacco products and would have suffered fewer health care costs resulting in a savings to the plaintiffs. Like the union in Associated General Contractors, the chain of causation between the plain-

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[4] This included any potential claim the union might have had that its revenues from dues payments declined because members lost jobs or wages as a result of the conspiracy. *Id.* at 541, n.46.

tiffs' injury and the defendants' alleged restraint on the market and attempt to monopolize the market contains too many speculative, tenuous links to withstand scrutiny. Further, the wealth of other pending actions against these defendants reveals a clearly viable and identifiable class of persons motivated to vindicate the public interest in antitrust enforcement. Finally, the risk of duplicative recoveries and the danger of complex apportionment of damages is very real given the pendency of actions filed by individual smokers, the State of Oregon, and health insurance companies. Nothing precludes these plaintiffs from seeking to enforce subrogation rights through any of these other actions, should those other actions succeed. While the plaintiffs here seek only those medical expenses that they have paid, individual claimants can seek the full spectrum of damages available for harm caused by smoking including medical expenses.

Plaintiffs' reliance upon *Blue Shield of Va. v. McCready*, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982) is misplaced since, as a consumer, the plaintiff in that case was a market participant who suffered a direct, financial injury from the allegedly anti-competitive practice. Although plaintiffs describe their injury as "direct," they do so in the context of explaining that their harm was foreseeable. As Associated General Contractors clarified, foreseeability is distinct from the proximate causation policy of limiting actions to those situated most immediately to the allegedly harmful conduct. While plaintiffs' harm may well have been foreseeable, plaintiffs' injury, if any, is entirely dependent upon the injuries suffered by their participants and beneficiaries. Plaintiffs are at least one step removed from the allegedly harmful conduct and plaintiffs therefore lack standing to maintain their antitrust claims.

To the extent plaintiffs seek to recover for tobacco overcharges, courts allow standing only to direct purchasers. *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 206-07, 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990); Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1233-34 (9th Cir. 1998).

Although not binding upon me, I note as persuasive authority the fact that every other federal court to address the issue of whether pension funds have standing to pursue claims under the antitrust laws has concluded that they do not. *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 7 F. Supp. 2d 277, 1998 WL 146217 (S.D.N.Y. 1998); *Southeast Florida Laborers District Health and Welfare Trust Fund v. Philip Morris*, 1998 U.S. Dist. LEXIS 5440, 1998 WL 186878 (S.D. Fla. April 13, 1998); *Stationary Engineers Local 39 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 1998 U.S. Dist. LEXIS 8302 (N.D. Cal. April 30, 1998). *See also Steamfitters Local Union No. 420 v. Philip Morris Inc.*, 1998 U.S. Dist. LEXIS 5951, 1998 WL 212846 (E.D. Pa. 1998) (rejecting all claims on grounds that plaintiff suffered no injury at all because it merely handled payments with money provided by others); *Seafarers Welfare Plan v. Philip Morris*, 1998 U.S. Dist. LEXIS 11875, No. MJG-97-2127, slip op. (D. Md. July 13, 1998) (following *Steamfitters*).[5]

Taking all of the allegations as true, I find that plaintiffs cannot meet the standing or proximate causation require-

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[5] While I agree with the skepticism expressed by courts in Pennsylvania and Maryland over plaintiffs' claimed injury to its "infrastructure" and whether plaintiffs have suffered any cognizable injury at all, for purposes of a motion on the pleadings, I have assumed that plaintiffs have suffered the injury alleged.

ments necessary to maintain an antitrust claim. I further find that the diminishment of the plaintiffs' trust corpus fails to constitute the type of injury Congress sought to redress with the antitrust laws. Accordingly, counts 3 through 6 are dismissed.

RICO, 18 U.S.C. § 1962(a), (c) and (d)

Plaintiffs allege that defendants intended to increase or maintain profits by developing a scheme to defraud consumers by wire and mail in violation of 18 U.S.C. §§ 1341 and 1343. Plaintiffs allege that defendants specifically intended to defraud the public "including plaintiffs" and their participants through national ads, communications with the Surgeon General and communications with each other. Plaintiffs seek to recover costs attributable to tobacco related diseases "wholly distinct from harms suffered by individuals." Plaintiffs contend that defendants intended to increase tobacco consumption and shift health care costs to the plaintiffs.

Section 1962(a) prohibits the use or investment of proceeds of racketeering activity to acquire, establish or operate such an enterprise. *United States v. Robertson*, 73 F.3d 249, 251 (9th Cir. 1996), cert. denied, 139 L. Ed. 2d 273, 118 S. Ct. 351 (1997). Section 1962(c), by contrast, prohibits racketeering acts to conduct an enterprise affecting interstate commerce. *Id.* Section 1962(d) requires proof of an agreement which is a substantive violation of RICO. *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir. 1993).

Liability under RICO, 18 U.S.C. § 1962(c) requires the conduct of an enterprise through a pattern of racketeering activity. *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). "Racketeering activity" includes certain acts indict-

able under Title 18, including the predicate acts of mail and wire fraud alleged in the second amended complaint. Plaintiffs must allege at least two acts of racketeering activity. *Bowen v. Oistead*, 125 F.3d 800, 806, cert. denied, 141 L. Ed. 2d 714, 118 S. Ct. 2343 (1998).

Section 1964(c) provides a civil damage remedy only to those persons who are injured "by reason of a violation of section 1962." *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992), cert. denied, 508 U.S. 908, 124 L. Ed. 2d 247, 113 S. Ct. 2336 (1993). In Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992), the SIPC filed an action against former members of a brokerage firm for securities fraud seeking to recover funds SIPC advanced to customers to cover the losses caused by defendants' fraudulent scheme.

SIPC was required under the Securities Investor Protection Act of 1970 to advance the funds to customers who were victims of the fraud. SIPC asserted RICO claims under ' 1962(c) and relied upon predicate acts of securities fraud under section 10(b) of the Securities and Exchange Act. The Court, citing § 1964(c), expressly rejected but/for causation and instead analyzed the claim under the "proximate cause" standard utilized in Associated General Contractors, noting that "the general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Id.* at 270 (citations omitted). The Court noted that there must be "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268. Applying the factors set forth in Associated General Contractors, the Court found that SIPC's alleged injury was too remote since it was contingent upon harm suffered by broker-dealers with costs passed along to

SIPC customers. The Court held that to allow actions by those indirectly impacted by alleged racketeering activity "would open the door to massive and complex damages litigation, which would not only burden the courts, but would also undermine the effectiveness of treble damages suits." Id. at 273-74 (internal citations omitted).

I find that this is precisely the type of indirect, massive and complex damage litigation that the Supreme Court sought to preclude in *Holmes*. The plaintiffs' injuries are entirely dependent upon injuries sustained by their participants and beneficiaries, making them at least one step removed from the challenged harmful conduct. That defendants may have specifically intended to harm health care providers by aggressively marketing their product and by concealing known health dangers fails to alter the threshold inquiry of standing and proximate causation[6]. Accordingly, plaintiffs' first claim is dismissed. Plaintiffs' second claim under Oregon's RICO statute is dismissed on the same grounds and the ground that plaintiffs have failed to plead a predicate criminal conviction as required under O.R.S. 166.725(7)(a)(A). The fact that plaintiffs rely upon allegedly fraudulent acts predating the 1995 ORICO amendments is irrelevant since the Amended Act applies to all actions filed after September

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[6] I also find that plaintiffs' reliance upon *National Organization for Women v. Scheidler*, 510 U.S. 249, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994) is misplaced. The plaintiffs were abortion clinics who sought to recover for losses sustained when abortion protesters interrupted clinic services. Proximate causation was not an issue and the Court's decision primarily focused upon whether RICO should apply to activities lacking an economic motive.

of 1995[7]. Accordingly, plaintiffs' second claim is also dismissed.[8]

Unfair Trade Practices Act (UTPA)

Plaintiffs allege that defendants violated O.R.S. 646.608, Oregon's UTPA by willfully misrepresenting that the Tobacco Institute and Council for Tobacco Research would be run by independent scientists, by misleading the public about defendants' knowledge of the harmful effects of tobacco and nicotine addiction and by suppressing product research.

Oregon's UTPA is a consumer protection statute. *See Cullen v. Investment Strategies, Inc.*, 139 Ore. App. 119, 127, 911 P.2d 936 (UTPA should be construed consistently with its consumer protective purposes), *rev. den.*, 323 Ore. 265, 918 P.2d 846 (1996); *Hinds v. Paul's Auto Werkstatt,*

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[7] In 1995, the Oregon Legislature amended ORICO requiring an actual conviction to meet the predicate offense requirement. That amendment became effective on September 12, 1995. Plaintiffs do not allege that defendants have been convicted of mail or wire fraud and there is no indication in the statute that claims arising prior to the amendment but filed after the amendment are preserved under the old law.

[8] I note that four of the five federal district courts to address federal RICO claims filed by pension funds dismissed the claims. *See Southeast Florida Laborers District Health and Welfare Trust Fund v. Philip Morris*, 1998 U.S. Dist. LEXIS 5440, 1998 WL 186878 (S.D. Fla. April 13, 1998); *Stationary Engineers Local 39 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 1998 U.S. Dist. LEXIS 8302 (N.D. Cal. April 30, 1998); *Steamfitters Local Union No. 420 v. Philip Morris Inc.*, 1998 WL 212846 (E.D. Pa. 1998); *Seafarers Welfare Plan v. Philip Morris*, 1998 U.S. Dist. LEXIS 11875, No. MJG-97-2127, slip op. (D. Md. July 13, 1998); *But see Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 7 F. Supp. 2d 277, 1998 WL 146217 (S.D.N.Y. 1998)(allowing claim to proceed based upon alleged harm to "infrastructure").

Inc., 107 Ore. App. 63, 65, 67, 810 P.2d 874 (UTPA intended to provide "broad remedial consumer protection"), *rev. den.*, 311 Ore. 643, 815 P.2d 1273 (1991). Although misrepresentations need not be made directly to the consumer to be actionable, "the general policy of the UTPA is to discourage deceptive trade practices and to provide a viable remedy for consumers who are damaged by such conduct."[9] *Raudebaugh v. Action Pest Control, Inc.*, 59 Ore. App. 166, 171, 650 P.2d 1006 (1982).

Plaintiffs have not alleged that they are consumers of defendants' products and thus, I find that they lack standing to maintain claims under the Oregon UTPA. However, even if plaintiffs could maintain such a claim, their asserted injury is derivative of their participants' personal injuries and the Oregon courts have expressly excluded personal injuries from coverage under the Act. *Gross-Haentjens v. Tharp*, 38 Ore. App. 313, 589 P.2d 1209 (1979); *Allen v. G.D. Searle*, 708 F. Supp. 1142 (D. Or. 1989) (rejecting a UTPA claim in the context of a personal injury action under *Gross-Haentjens*). Plaintiffs' attempts to characterize their damage as economic and solely in reference to the Fund's infra-

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[9] Plaintiffs rely upon *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto, Inc.*, 129 Ore. App. 206, 879 P.2d 193 (1994), aff'd in part, rev'd in part, 325 Ore. 46, 932 P.2d 1141 (1997) for the proposition that a plaintiff need not be a "consumer" to maintain an action under the UTPA. Goodyear involved an action by a franchisee against a franchisor and the issue was whether a corporation could ever maintain an action under the Act. The court held that the franchisee was a "person" under the Act and could maintain a claim. However, the franchisee was a consumer of the franchisor's products and services. Thus, my ruling is not based upon the fact that plaintiffs are entities rather than individuals, but is instead based upon the fact that plaintiffs have not alleged that they are in any manner "consumers" of defendants' products.

structure reflect a distinction in artful pleading rather than substance. Therefore, plaintiffs' seventh claim is dismissed.

Fraud

To recover for common law fraud under Oregon law, a party must establish: "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted upon by the hearer in the manner reasonably contemplated; (6) the hearer's ignorance of the representation's falsity; (7) the hearer's reliance on the truth of the representation; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Goodyear Tire & Rubber Co.*, 129 Ore. App. at 211, citing *Webb v. Clark*, 274 Ore. 387, 391, 546 P.2d 1078 (1976).

Plaintiffs have adequately pled that defendants made materially false statements, that defendants intended that plaintiffs would rely upon those statements by foregoing efforts to curb tobacco use among their members, and that plaintiffs relied upon defendants' statements when they failed to take more aggressive steps to address their participants' tobacco use. Further, while noting that there is a significant debate on this issue, I will assume without deciding that plaintiffs were justified in that reliance. The critical issue then is again, proximate causation.

The parties have not cited nor have I been able to find any Oregon decision directly addressing the proximate causation issue in the context of a fraud claim. However, in *Ore-Ida Foods, Inc. v. Indian Head Cattle Co.*, 290 Ore. 909, 627 P.2d 469 (1981), the Oregon Supreme Court rejected an employer's attempt to recoup worker's compensation benefits it paid to the unmarried cohabitant of a deceased employee by

filing a negligence action against the third party whose negligence allegedly caused the employee's death. The Court held that absent an express subrogation or assignment provision and where the beneficiary had no claim for wrongful death (given her unmarried status), dismissal was proper. In reaching its conclusion, the Court noted "the prevailing rule in the United States and England is that a plaintiff may not recover for economic loss resulting from negligent infliction of bodily harm to a third person." *Id.* at 916.[10]

I note that *Ore-Ida* is distinguishable because the underlying victim in that case (the decedent employee's beneficiary) had no independent cause of action she could have maintained against the third party. However, the Court's analysis is entirely consistent with the proximate cause analysis set forth in *Associated General Contractors* and *Holmes* and is also consistent with common law cases involving intentional torts. *See Mobile Life Ins. Co. v. Brame*, 95 U.S. 754, 24 L. Ed. 580 (1877) (holding that an insurer has no claim to recover death benefits paid against a third party who allegedly murdered the insured). Other Oregon cases have applied these same standards to limit recovery to direct victims. In *Norwest v. Presbyterian Intercommunity Hospital*, 293 Ore. 543, 652 P.2d 318 (1982), the Court held that a minor child could not maintain an action for damages sustained due to deficient treatment given to his mother. The Court found that even though the minor child suffered a

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[10] For a more in-depth discussion of proximate causation under the common law of England and U.S. law back to 1846, *see State of Maryland v. Philip Morris, Inc.*, 1997 WL 540913(Md. Cir. Ct. May 21, 1997) (holding that in the absence of statute expressly allowing recovery, damages sought by the State of Maryland for tobacco related health care costs were too remote to support recovery).

distinct injury and even though that injury was reasonably foreseeable:

> "The obstacle to plaintiff's action is that ordinarily negligence as a legal source of liability gives rise only to an obligation to compensate the person immediately injured, not anyone who predictably suffers loss in consequence of that injury, unless liability for that consequential loss has a legal source besides foreseeability."

Id. at 569. *Accord, Ammons v. Jackson Co.*, 119 Ore. App. 181, 183, 850 P.2d 376, rev. den. 318 Or. 24 (1993).

The case of *Oksenholt v. Lederle Laboratories*, 294 Ore. 213, 656 P.2d 293 (1982) provides a helpful contrast. A physician filed an action against a drug manufacturer claiming that the manufacturer made negligent or fraudulent misrepresentations about a drug that the physician prescribed. As a result of the misinformation, a patient filed a malpractice action against the doctor which resulted in a settlement. The doctor sought to recover the costs of the settlement and sought damages for injury to his reputation and lost income. The Court held that the physician could only recover those damages "which are a direct and necessary result of defendant's acts or omissions." *Id.* at 221. Applying this standard, the Court sustained dismissal of the claim for the settlement award to the patient, but allowed the claim to proceed as to the doctor's own alleged reputational and work loss injuries. *Id.* at 223.

In this case, plaintiffs seek only to recover medical costs paid on behalf of their members. Like the insurer in Brame, plaintiffs were under a contractual duty to pay those benefits

regardless of the genesis of the medical condition giving rise to the claim. Unlike the doctor in *Oksenholt*, plaintiffs suffered no injury independent of the injury suffered by their participants and beneficiaries. They essentially seek to recover the same type of settlement costs paid out by the doctor to his patient. The fact that the plaintiffs may have suffered an injury distinct from that of their participants and the fact that their losses may have been reasonably foreseeable to the defendants fails to overcome the obstacle identified in *Norwest* that tort claims are limited to those immediately injured.

I note that Judge D. Lowell Jensen allowed plaintiffs leave to amend common law fraud claims in Stationary Engineers to permit plaintiffs to allege that they could have created programs to reduce expenditures but for defendants' misrepresentations. However, I cannot square that ruling with the dismissal with prejudice of the RICO claims since fraud is the predicate for RICO and because I find that the same proximate causation analysis applicable from *Holmes* to the RICO claims applies with equal force to the common law fraud claims under Oregon law. Accordingly, plaintiffs' eighth claim for fraud is dismissed.

Unjust Enrichment and Indemnity

To state a claim for unjust enrichment, plaintiffs must allege that they conferred a benefit upon the defendants and that it would be unjust for defendant to retain that benefit.. *Construction, Inc. v. Shea*, 155 Ore. App. 156, 1998 WL 394350, *1-2, 961 P.2d 295 (Or. App. 1998). "For an injustice to be found, one of three things must be true: (1) the plaintiff had a reasonable expectation of payment; (2) the defendant should reasonably have expected to pay; or (3) so-

ciety's reasonable expectations of security of person and property would be defeated by non-payment." *Yanney v. Koehler*, 147 Ore. App. 269, 278, 935 P.2d 1235, rev. denied, 325 Ore. 368, 939 P.2d 45 (1997) (citations omitted).

Indemnity claims are similar in that a plaintiff must establish that it conferred a benefit upon a defendant by discharging some legal obligation owed by the defendant to a third party. To state a common law indemnity claim, plaintiffs must allege that a third party made a claim, that the party reasonably incurred costs in defending or satisfying the claim and that, as between the party seeking indemnity and the indemnitor, the costs incurred ought to be borne by the latter. *Martin v. Cahill*, 90 Ore. App. 332, 336, 752 P.2d 857 (1998). The fact that a defendant may incidentally benefit from a contract between the plaintiff and a third party is insufficient. *See Aetna Casualty & Surety Co. v. Oregon Health Sciences University*, 310 Ore. 61, 65, 793 P.2d 320 (1990).

With two limited exceptions,[11] I note that every state and federal court to address unjust enrichment and indemnity claims filed by pension funds or states have dismissed them on grounds that plaintiffs paid out benefits at the behest of their participants and beneficiaries and not for the benefit of the defendants. Further, plaintiffs fail to identify any common law duty on the part of plaintiffs and defendants to pay

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[11] Judges in Minnesota and Wisconsin denied motions to dismiss unjust enrichment claims without analysis of the "benefit conferred" issue. *State of Minnesota and Blue Cross/Blue Shiled of Minnesota v. Philip Morris, Inc.*, 551 N.W.2d 490, 497 (Minn. 1996); *State of Wisconsin v. Philip Morris, Inc.*, No. 97-CV-328, slip op. (Dane County Cir. Ct. March 17, 1998).

medical expenses, nor do they identify the source of any duty imposed upon defendants to pay for such medical expenses. I concur with the other courts that have addressed this issue and find that the theory is inapplicable to the facts in this case. Accordingly, plaintiffs ninth and twelfth claims are dismissed.

Breach of An Assumed Duty

Plaintiffs allege that defendants voluntarily assumed a special duty to conduct and report medical research and that they breached this duty by suppressing negative research data. With one exception (applying California law), every federal and state court addressing claims of this kind as against the tobacco industry have entered dismissal orders based upon the absence of physical harm, a necessary element under Sections 323 and 324A of the Restatement of Torts (Second).

Plaintiffs argue that Oregon law does not require physical harm to support a claim for breach of an assumed duty. In *McDonald v. Title Ins. of Oregon*, 49 Ore. App. 1055, 621 P.2d 654 (1980), rev. den. 290 Ore. 727, 631 P.2d 340 (1981), the court sustained a claim filed by a home buyer against a title insurer who falsely advised the plaintiff that subcontractors had been paid and plaintiffs would not be liable for the subcontractors' expenses. However, the court analogized the facts to that of a "rescue" and did not cite Restatement Sections 323 or 324A. The Supreme Court recognized a negligent misrepresentation claim for economic damages in *Onita Pacific Corp. v. Trustees of Bronson*, 315 Ore. 149, 159, 843 P.2d 890 (1992) but that was in the context of finding a duty that arose from a special relationship between the parties. Other Oregon cases have relied upon Section 323

without discussing the physical harm requirement, since there was no dispute that the claims involved physical injury. *See Quackenbush v. PGE Co.*, 134 Ore. App. 111, 118, 894 P.2d 535, rev. den. 322 Or. 193 (1995); *Arney v. Baird*, 62 Ore. App. 643, 647, 661 P.2d 1364, rev. den., 295 Ore. 446, 668 P.2d 382 (1983)

I find that if directly confronted with the issue, Oregon courts would follow the Restatement Section 323 and 324A and find that physical harm is a requisite element of a claim for breach of an assumed duty. However, even if the Oregon courts declined to adopt the physical harm requirement, the holding from *Onita Pacific* would require that some special fiduciary-like relationship exist between the parties to sustain such a claim. Plaintiffs have not alleged that there is any special relationship between the parties. The statements which form the basis for the claimed assumption of the duty to conduct and report medical research were made to the public at large in advertisements. In addition, plaintiffs cannot show proximate causation necessary to sustain a tort claim under Oregon law for the reasons cited above. Accordingly, plaintiffs' tenth claim is dismissed.

Civil Conspiracy

Under Oregon law, a civil conspiracy is: "a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means." *Yanney*, 147 Ore. App. at 272 (citations omitted). A claim for civil conspiracy must allege facts showing: "(1) Two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." *Id.*

Plaintiffs' claim for conspiracy is entirely dependent upon its underlying claims for fraud and violations of the UTPA. Because I find dismissal appropriate for the underlying claims, and because I find that plaintiffs fail to satisfy common law proximate causation standards, plaintiffs' eleventh claim for conspiracy must be dismissed as well.

Conclusion

The Second Amended Complaint is 140 pages long and details an allegedly sordid history of irresponsible corporate management and unchecked greed on the part of the tobacco industry. However compelling these charges may be, there are very sound judicial policy reasons for limiting legal actions to those parties most directly injured by the harmful conduct. These policies are not new and have lengthy historical roots in our jurisprudence. To allow plaintiffs to maintain actions that are entirely dependent upon the harm suffered by others threatens chaos for the judicial system, especially where others may (and have) filed their own actions and are capable of recovering a full range of damages, including the medical costs sought here. Accordingly, defendants' motion for judgment on the pleadings for failure to state a claim (# 137) is GRANTED; defendants' alternative

motion for judgment on the pleadings for failure to join necessary parties (# 138) is MOOT.

IT IS SO ORDERED.

DATED this 24 day of August, 1998.

Malcolm F. Marsh

United States District Judge

APPENDIX C

15 U.S.C. § 15: Suits by persons injured.

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only —

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the

purpose of delaying the litigation or increasing the cost thereof.

18 U.S.C. § 1964: Civil remedies.

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall

start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.